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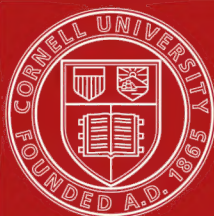
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**A digest of the law of real property.**



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# D I G E S T

OF

## THE LAW OF REAL PROPERTY.

BY WILLIAM CRUISE, ESQ.

BARRISTER AT LAW.

---

REVISED AND CONSIDERABLY ENLARGED  
BY HENRY HOPLEY WHITE, ESQ.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

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FURTHER REVISED AND ABRIDGED, WITH ADDITIONS AND NOTES FOR THE  
USE OF AMERICAN STUDENTS,

BY SIMON GREENLEAF, LL.D.

EMERITUS PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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IN SEVEN VOLUMES.

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### VOLUME I.

CONTAINING

A PRELIMINARY DISSERTATION ON TENURES.

Title 1. ESTATE IN FEE SIMPLE.

2. ESTATE IN TAIL.

3. ESTATE FOR LIFE.

4. ESTATE TAIL AFTER POSSIBILITY.

5. CURTESY.

6. DOWER.

Title 7. JOINTURE.

8. ESTATE FOR YEARS.

9. ESTATE AT WILL AND AT SUFFERANCE.

10. COPYHOLD.

11. USE.

12. TRUST.

SECOND EDITION.

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TO  
MY BELOVED PUPILS  
THESE LABORS,  
ORIGINALLY UNDERTAKEN FOR THEIR BENEFIT,

INSCRIBED,  
BY THEIR AFFECTIONATE FRIEND,

SIMON GREENLEAF.



THE

## ENGLISH EDITOR'S PREFACE.

---

It is now thirty years since Mr. Cruise's Digest of the Law of Real Property was first published. During that time it has gone through three large editions; and a fourth being required, is such unequivocal proof of merit, that it would be inpertinent, in this place, to attempt any commendation of a work, already so strongly impressed with the stamp of public approbation.

In preparing the present, the Editor has carefully endeavored to preserve the integrity of the text of the third edition; and in almost every instance, the corrections, alterations, and additions will be found within brackets. He has corrected whatever errors were discovered,\* either in the statements of the cases cited by Mr. Cruise, or in his conclusions; and has added the leading authorities reported since the publication of the third edition.

The several statutes, lately effecting important and extensive changes in the law of real property, very much increased the anxiety and responsibility of the laborious task undertaken by the Editor; and in the execution of



that portion of his duty more particularly, he feels some claim must be made upon the indulgence of the profession. He cannot be so sanguine in the success of his efforts, as to suppose there are not many instances, in which the bearings of these statutes upon the old law have escaped his attention. Indeed, many years must elapse before all the consequences of the changes can be known.

Nearly 1100 cases, either stated or referred to, have been added in the present edition, and these are distinguished in the Index of Cases by an asterisk.

The Editor is responsible for Chapter XVI. on Powers of Sale and Exchange, under the title *DEED*, Vol. IV.; and for the additional Chapter on *MERGER*, Vol. VI. For the insertion of the latter, an apology is not deemed necessary, the subject being important, and but incidentally noticed by Mr. Cruise. The Editor most fully acknowledges his obligations to the valuable labors of Mr. Preston, in his third volume of *Conveyancing*: but thinking the subject of *Merger* not exhausted, and that a short treatise upon it would be acceptable, he ventured to insert the Chapter under Tit. XXXIX.

The Acts relating to real property, passed in the last session of Parliament, and subsequently to the printing of the fifth volume, have been inserted or abridged in an Appendix, Vol. VII.; and through this medium, the Editor has offered some observations upon a few points, that have occurred in practice, principally respecting the construction of the English Act for abolishing fines and recoveries.

Until the second volume was nearly printed, he was not aware of the inaccuracies in the references to cases, in the

margin of the last edition : when, therefore, such inaccuracies in the first two volumes are not mentioned among the Errata, the reader will find the names and references accurately inserted in the General Index of Cases, Vol. VII. The references to the cases in the four succeeding volumes have been examined and corrected ; and, through the kindness of friends, the Editor has collated several copies of the former editions.

*Lincoln's Inn,*  
*November, 1834.*





## PREFACE

### TO THE FIRST AMERICAN EDITION.

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THOUGH the work of Mr. Cruise has been more than forty years before the public, it still remains unrivalled, as the most comprehensive and best digested system of the law of Real Property. Others have been published more compact in form, and containing the more recent decisions; but their brevity in the statement of the cases, though no small merit in a book of reference in the eyes of the practitioner, renders them in the same proportion less useful to the student. For this reason, principally, this work has been retained as a text-book, in preference to all others, in the Law School of Harvard University; though the numerous modifications which this branch of the law has subsequently received in England and America, augmented, in no small degree, both the labors of the instructor and the perplexities of the student. To obviate these difficulties, the preparation of the notes to this edition was originally undertaken, and they are now with diffidence made public.

In correcting the text, the Editor has endeavored to abridge those cases which were transcribed at large from

books easily accessible to every American lawyer, retaining the full reports of those cases only which cannot conveniently elsewhere be found. The titles, chapters, and cases, which are believed to be of no use to the profession in this country, have been wholly omitted. Most of the English statutes, enacted prior to the revolution, have been retained as they stood in the text; including all those which were passed before the settlement of the American colonies, and are supposed to have been brought over and adopted by the colonists as parts of the English law. The later statutes, contained in the body of the work, have been transferred, generally in an abbreviated form, to the notes; but the Editor has not deemed it expedient to take notice of any other changes made by recent statutes in England.

It was his original intention to embody in the text (distinguished by parentheses) all the cases in which the common law has been modified and expounded, in both countries; but this design, after proceeding in it to some extent in the first volume, was abandoned, and all new matter confined to the notes.

The most embarrassing difficulty which the Editor has had to encounter, has been in regard to the local laws of the several United States. Though he has had access to the Revised Codes of all whose laws he has attempted to state, which may be supposed to contain the most permanent of their legislation on the subject of real property; yet as to several of them, especially the more distant States, it has not been in his power to obtain the very latest of their statutes. And in all the Western States, and in a degree in some of the others also, such is the unsettled character of the population, that the entire body of municipal law may

be justly regarded as still in a state of experiment. All, therefore, that the Editor could do, was to give the dates of the statutes to which he has referred, leaving to the reader the labor of further research. Information of any errors which may be found in this or any other part of the work, will be thankfully received by the Editor, and corrected in a future edition, should this attempt receive encouragement from the profession.

*Boston, March 5, 1849.*







## ADVERTISEMENT

TO THE FIRST AMERICAN EDITION. .

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THE additions made to the text by Mr. White are included in brackets, [ ]; and those of the present Editor in parentheses, ( ). Those portions of the former text which are now transferred to the notes, are marked by a (†), or some similar character. The notes of Mr. White, including the very few made by Mr. Cruise, are marked in like manner. The notes of the present Editor are distinguished by the numerals 1, 2, 3, &c. ; and the authorities added by him to the citations in support of the text, are included in parentheses. The pages referred to, throughout the work, are those of Mr. White's edition.





## ADVERTISEMENT TO THE SECOND EDITION.

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IN preparing this Edition for the press, the notes, which Mr. Greenleaf had made in anticipation of a new Edition, are added to his former notes. The Editor has given references to the decisions made, and to some of the statutes passed, since the publication of the former Edition. What he has added is placed in the notes in brackets, [ ], either without any reference to the text, where they form part of other notes, or with a reference to the text by the numerals 1, 2, 3, &c. It will be recollected that the notes of the English Editor are also included in [ ], but the references to the text are by a † or ‡, &c. For the greater convenience of reference from the Index, the volumes of this Edition have been paged consecutively to the end of each volume, and the references from the Index are to this paging. This will not interfere with other references, as the star paging has been preserved. It is hoped that some of the difficulties of reference from the Index felt in the former volumes will in this manner, and by the lettering of the binder, be avoided.

*Boston, October, 1856.*



## ADVERTISEMENT.<sup>1</sup>

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THE reader will doubtless observe, that in the lists of "Books of Reference," under the respective titles in these volumes, the Editor has not affected to make a complete catalogue of authors, it being his intention only to direct the student to a few elementary treatises on the subject of each title. Of course it was not within his plan to include the several abridgments both of English and American law; works not only in every lawyer's library, but designed rather for the use of the practitioner than for the student. To obviate any misconception which may have arisen, he deems it proper to state that it was for this reason, and not for any light estimation of their merits, that some of these valuable abridgments are not inserted in the list, and that the others are so rarely referred to.

<sup>1</sup> The above Advertisement was prefixed by Mr. Greenleaf to the second volume of his edition of Cruise.



## ANALYSIS OF THE DIGEST.

- REAL PROPERTY.
- 1. Several Kinds.
    - Tenures by which it is held.
      - 1. Corporeal or Land.
        - Estates therein.
          - 1. Quantity of Interest.
            - 1. Freehold.
              - 1. Estate in Fee Simple.
              - 2. Estate in Tail.
              - 3. Estate for Life.
              - 4. Estate Tail after Possibility, &c.
              - 5. Curtesy.
              - 6. Dower.
              - 7. Jointure.
            - 2. Less than Freehold.
              - 1. Estate for Years.
              - 2. Estate at Will, and at Sufferance.
            - 3. Customary.
              - Copyhold.
            - 4. Equitable.
              - 1. Use.
              - 2. Trust.
            - 5. Upon Condition.
            - 6. As a Pledge or Security.
              - 1. Estate by Statute Merchant, &c.
              - 2. Mortgage.
          - 2. Time of Enjoyment.
            - 1. Possession.
            - 2. Remainder.
            - 3. Reversion.
          - 3. Number and Connection of the Tenants.
            - 1. Severalty.
            - 2. Joint Tenancy.
            - 3. Coparcenary.
            - 4. Common.
        - 2. Incorporeal.
          - 1. Advowson.
          - 2. Tithes.
          - 3. Common.
          - 4. Ways.
          - 5. Offices.
          - 6. Dignities.
          - 7. Franchises.
          - 8. Rents.
    - 2. Title thereto.
      - 1. Descent.
      - 2. Purchase.
        - 1. Escheat.
        - 2. Prescription.
        - 3. Alienation.
          - 1. Deed.
          - 2. Matter of Record.
            - 1. Private Act.
            - 2. King's Grant.
            - 3. Fine.
            - 4. Recovery.
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The Chapter on Merger has been added by the English Editor.



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A  
DIGEST  
OF THE  
LAW OF REAL PROPERTY.

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PRELIMINARY DISSERTATION ON TENURES.<sup>1</sup>

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BOOKS OF REFERENCE UNDER THIS TITLE.

The principal *English* writers are these :—

*Sir HENRY SPELMAN.* Treatise on the Original Growth, Propagation and Condition of Feuds and Tenures by Knight-Service, in England. This Treatise is printed in the learned author's Posthumous Works. Lond. 1723. fol.

*Sir THOMAS LITTLETON.* Treatise of Tenures. Book 2.

*JOHN DALRYMPLE.* History of Feudal Property in Great Britain. 12mo.

*Sir MARTIN WRIGHT.* Introduction to the Law of Tenures. 8vo.

*Sir WILLIAM BLACKSTONE.* Commentaries on the Laws of England. Book II. ch. 4, 5, 6.

*FRANCIS STOUGHTON SULLIVAN, LL. D.* Historical Treatise on the Feudal Law, and the Constitution and Laws of England, &c., in a course of Lectures read in the University of Dublin.

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<sup>1</sup> This Preliminary Dissertation on Tenures was not in the original edition of this work, but was inserted in the second edition, by the learned author, as a necessary introduction to the Law of Real Property. For the same reason it is retained in this edition as equally necessary to the American lawyer. Much of this branch of the law has its foundation in the feudal system; without the knowledge of which, in its principal relations, the doctrines of the law of Real Property cannot be well understood. The student, indeed, may treasure in his memory a set of rules, at this day apparently arbitrary, but can know little of the principles on which they were constructed; and his progress must consequently be slower, and his conclusions much less firm and satisfactory, than though he had traced up these doctrines to their sources, and thus mastered the philosophy of the science.

*Chief Baron GILBERT.* Law of Tenures. An Outline of the History and Law of Feuds is contained in the Introduction and first chapter of this valuable work.

*THOMÆ CRAGII Jus Feudale.* Of this profound treatise, originally published in the reign of *James I.*, and dedicated to that Prince, the best edition is that by *J. Baillie.* Edinb. 1732: fol.

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*GILBERT STUART.* Historical Dissertation concerning the Antiquity of the English Constitution. Also, his Observations concerning the Public Law and the Constitutional History of Scotland. Also, his View of the Progress of Society in Europe.

*GEORGE SPENCE.* On the Equitable Jurisdiction of the Court of Chancery. Vol. I. Part I. Book I. ch. VII.—X.

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*DAVID HOFFMAN*, in his Legal Outlines, Lect. 10.

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*JAMES SULLIVAN.* History of Land Titles in Massachusetts. p. 1 to 64.

Other authorities are these:—

*CONSUETUDINES FEUDORUM.* This is the work mentioned by Mr. Cruise in this Preliminary Dissertation, ch. I., § 28.

*PAULUS CHRISTINÆUS.* In Consuetudines Feudorum. This Commentary composes the 6th volume of his Decisiones. Antwerp. 1671. fol.

*GEORGIUS ADAMUS STRUVIUS.* Syntagma Juris Feudalis. In one vol., 4to.

*J. CUJACIUS.* De Feudis, Libri Quinque. This work is contained in the Opera Priora of Cujacius, Tom. II., fol.; and in Tom. X. of the quarto edition recently published. The latter is to be preferred, for a learned Dissertation which is prefixed to the treatise.

*H. ROSENTHAL.* Tractatus et Synopsis totius Juris Feudalis. 2 tom. fol.

*J. L. ROTHIIUS.* Pandectæ Feudales. In one vol., 4to.

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*DAVID HOUARD.* Anciennes Loix des Francois, conservées dans les coutumes Angloises recueillies par LITTLETON. This is a modern French translation of Littleton's Tenures, with a Commentary by M. Houard, in two volumes 4to. The second volume consists chiefly of *Preuves et Pieces Justificatives*, and a Glossary of the obsolete words in Littleton.

*CHARLES DUMOULIN.* [*Molinæus.*] In Consuetudines Parisienses. Tit. I. De Fiefs.

*HENRI BASNAGE.* Commentaires sur la Coutume de Normandie. Tit. Des Fiefs et Droits Feudaux. Art. 98—212.



## CHAP. I.

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## CHAP. II.

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## CHAP. I.

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SECTION 1. It is generally agreed that the laws of England are derived from those of the northern nations, who, migrating from the forests of Germany, overturned the Roman empire, and established themselves in the southern parts of Europe.

\* 2. Both the Danes and Saxons were undoubtedly swarms from the northern hive: it may therefore be presumed that the description which Tacitus has left us of the manners and customs of the Germans is in every respect applicable to them. And as the Saxons upon their establishment in England exterminated, rather than subdued, the ancient inhab-

itants, they introduced their own laws, without adopting the smallest portion of those which prevailed among the ancient Britons.<sup>1</sup>

3. The French nation also derive their origin from a tribe of Germans who crossed the Rhine under Clovis about the year 481, and established themselves in the northern provinces of France.

4. The different German tribes were first governed by codes of laws formed by their respective chiefs. One of the most ancient of these is the Salic Law, which is generally supposed to have been written in the fifth century.

5. Montesquieu says, that the tribe of the Ripuarian Franks, having united themselves to the Salian Franks under Clovis, preserved their original customs; and that Theodoric, king of Austrasia, caused them to be reduced into writing; and also collected the laws of those Bavarians and Germans, who were dependent upon his kingdom. As to the Saxons, Charlemagne, who was their first conqueror, gave them a code of laws which is still extant. (a)<sup>2</sup>

6. While Clovis and his descendants governed France, that country was ruled by the Theodosian code and the laws of the different German tribes who had settled there. But the Theodosian code was in course of time abrogated or forgotten; because great advantages were allowed to those who lived under the Salic Law.

7. During the reigns of the first French monarchs, a general assembly of the nation took place every year, in the month of March, afterwards in the month of May; where many ordinances were made which acquired the force of law, and were called *Capitularii*.

(a) Montesq. Sp. L. B. L. 28, c. 1.

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<sup>1</sup> Perhaps it would be more accurate to say, that the Saxons adopted but a small portion of the laws of the Britons; and that the description by Tacitus is applicable in very many if not most respects to the Danes and Saxons.

<sup>2</sup> The codes referred to by Montesquieu may be found in Canciani's collection, entitled *Barbarorum Leges Antiquæ*, &c. 5 vols. fol. *Venetiis*, 1781—5. The early laws and customs of the northern nations may be inferred with tolerable certainty from the *Jus Commune Norvegicum*, a compilation made in the year 1274, by order of the king, out of the then existing codes in the realm. It was published at Copenhagen, in 1817, in one vol. 4to.

8. The introduction of feuds produced a variety of regulations inconsistent with the ancient codes of laws; and France became at that time divided into an infinite number of small seigniories, whose lords acknowledged a feudal dependency only, not a political one, on the monarch. In consequence of this circumstance, it became impossible that they should all be regulated by the same laws. The codes of the Germans and the *Capitularia*,\* were superseded by these local customs; \*3 each seignior and province had its own; and there were scarce two seigniories in the whole kingdom whose customs agreed in every particular. (a)

9. Several of these customs were collected and published in the course of the fifteenth century, under the directions of the kings of France, and authenticated by the most eminent lawyers and magistrates of the different provinces; but they had in general been put into writing by private individuals long before that period.

10. Normandy, like all other provinces of France, was governed by its own customs. When it was ceded to Rollo in the year 912, to be held of the crown of France by homage and fealty, he caused an inquiry to be made into its ancient usages, and added his sanction to their former authority. Now, as Normandy did not experience those troubles and revolutions which disturbed the other parts of France, during the tenth and eleventh centuries, it is generally supposed that the original laws and customs of the Franks were preserved with more purity, and suffered less from a mixture of the canon and civil law in Normandy, than in any other province of France. (b)

11. Upon the establishment of the Normans in England, the whole customary law of that province, which, according to Basnage, one of its best commentators, had been already reduced into writing, was introduced here; and as our kings had great possessions in France, and frequently visited that country for two centuries after the Conquest, they borrowed from the French many of the improvements which were made in their jurisprudence, and established them in England.

12. If these facts are admitted, it will follow that the primeval customs of the Germans, as described by Tacitus; the codes of

(a) Montesq. Sp. Laws, B. 28, c. 9.

(b) Houard's Lit. Pref.

the different German tribes,<sup>1</sup> together with the laws of the Germans during the middle ages; the *Capitularia* of the French monarchs of the two first races; and the customs of the different provinces of France, particularly those of Normandy, which were chiefly founded on feudal principles; are the real sources from which our ancient laws can, with any certainty, be deduced.

13. In the ninth and tenth centuries there were only two tenures, or modes of holding lands upon the continent, 4\* which \* were called Allodial and Feudal. *Allodial lands* were those whereof the owner had the *dominium directum et verum*; the complete and absolute property, free from all services to any particular lord.<sup>2</sup> *Allodium est proprietas quæ a nullo recognoscitur. Qui tenet in Allodium, id est, in plenam et absolutam proprietatem, habet integrum et directum dominium, quale a principio de jure gentium fuit distributum et distinctum.* So that the owner of an *Allodium* could dispose of it at his pleasure, or transmit it as an inheritance to his children. (a)

14. A *feud* was a tract of land acquired by the voluntary and gratuitous donation of a superior; and held on condition of fidelity and certain services, which were in general of a military nature. The tenure of the feudatory was of the most precarious kind, depending entirely on the will and pleasure of the person who granted; and this singular system was derived from the following circumstances:—

15. We learn from Cæsar and Tacitus that the individual German had no private property in land; that it was his nation or tribe which allowed him annually a portion of ground for his support; that the ultimate property, or *dominium verum* of the lands, was vested in the tribe; and that the portions dealt out to individuals returned to the public, after they had reaped the fruits of them. Thus Tacitus says:—*Agri pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum*

(a) Dumoulin, (In Consuet. Parisien. Tit. 1, § 67. Opera, Tom. 1, p. 658.)

<sup>1</sup> Sir H. Spelman says:—*In legibus Henrici I. Regis Angliæ, multa reperio e Lege Salicâ deprompta; interdum nominatim, interdum verbatim.*—Gloss. voc. Lex.

<sup>2</sup> Quod est verè, simplicissimè, et absolutissimè Allodium, nativa sua naturalis juris libertate, originaliter et perpetuò gaudens; nullius unquam hominis, servituti aut recognitioni subditum. Dumoulin, [sive Molinæus] Consuet. Paris. Tit. I. § 1. 1.

*dignationem partiuntur. Facilitatem partiendi camporum spatia præstant; arva per annos mutant, et superest ager.* (a)

16. With these ideas and this practice, the Germans made conquests. When they had acquired a province of the empire, the land became the property of the victorious nation; each individual laid claim to a share of it; a tract of ground was accordingly marked out for the leader of the expedition; and to the inferior orders, portions, corresponding to their respective merits and importance, were allotted.

17. As the quantity of land thus acquired was not sufficient to allow of an annual change; and as the increased knowledge of agriculture, and the refinement of manners which then took place, would have rendered such an annual change extremely inconvenient; the lands thus given became the permanent property of the occupiers.

18. The situation of a German tribe on its first establishment \* in a conquered country being extremely precarious, the necessity of defence induced the chiefs to annex to each grant or allotment of land a condition of military service. The generality of writers have concluded from this circumstance, that the allotments of land originally made to the individuals of a German tribe, on their first establishment in a conquered country, were mere *beneficia*, or feuds, and have derived from thence the origin of the Feudal Law. But a variety of arguments may be produced to prove that the lands thus granted were not feuds. \*5

19. It is universally admitted that feuds were originally voluntary and gratuitous donations, to be held at the mere will of the giver, who could resume them at pleasure.<sup>1</sup> Now, when

(a) Cæsar, De Bello Gal. Lib. 6, c. 21. Tacitus, De Mor. Germ. c. 26.

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<sup>1</sup> This assertion, though contained in the Book of Feuds, Mr. Spence says is contradicted by the Anglo-Saxon history as far as any authentic records extend, and is not confirmed by the early documents or history of any other nation. He admits that the Anglo-Saxon lords, as well as those of the continent, did in some cases grant benefices revocable at pleasure, or for a term short of the life of the beneficiary, or only for his life; but he asserts that nothing is found in any earlier documents to show that they did not, from the very first, make grants of transmissible or hereditary benefices; and he cites documentary instances of such grants, in the times of the Saxon princes, in England, Scotland, and France. And these writings, he observes, do not countenance the notion of the Master of the Rolls, in Burgess v. Wheate, (see 1 Eden, R. 192,) that the introduction of the power of alienation was *an era* in the

the Germans first settled in the southern parts of Europe, they enjoyed a very great degree of liberty; and upon the distribution of the lands in a conquered province, each individual claimed that portion of them to which his rank and services entitled him, not as a favor, but as a right, being the just reward of his toils. Nor can it be supposed that a people who did not conquer for their chiefs only, but also for themselves, should submit to hold their acquisitions as the voluntary and gratuitous donations of their leader, and on so precarious a tenure as his will and pleasure. (a)

20. The feudal system was not generally established till some centuries after the settlement of the German nations in Italy and France; nor did the circumstance of annexing a condition of military service to a grant of lands imply that they were held by a feudal tenure; for the possessors of allodial property, who were in France called *Liberi Homines*, were bound to the performance of military service; and some very respectable French writers, among whom is Mons. Bouquet, derive the word *allodium* from *los*, which signifies *lot*; and, from this etymology, conclude that allodial property was that which was acquired by lot, upon the distribution of lands among the Franks. (b)

21. The original idea of feuds appears to have been derived from the following circumstances. Tacitus says, the chief men among the Germans endeavored to attach to their persons and interests certain adherents whom they called *Comites*; — *Insignis nobilitas, aut magna patrum merita, principis dignationem etiam adolescentibus adsignant. Cæteri robustioribus ac jampridem probatis aggregantur; nec rubor inter comites aspici.*  
6 \* *Gradus \* quinetiam et ipse comitus habet, judicio ejus, quem sectantur; magnaque et comitum æmulatio, quibus primus apud principem suum locus; et principum cui plurimi et acerrimi comites. Hæc dignitas, hæ vires, magno semper electorum juvenum globo circumdari; in pace decus, in bello præsidium.*

(a) Robertson's Hist. of Charles V. Vol. I. 254, 8vo.

(b) Bouquet, Droit Pub. Robertson's Hist. of Charles V. Vol. I. 256. 8vo. Sismondi Hist. des Français, Tom. III. 219.

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history of benefices. See Spence on the Equitable Jurisdiction of the Court of Chancery, Vol. I. p. 44—46, a deeply interesting and learned work, and one that will amply reward the diligent attention of the American student.

22. This custom was continued by the German princes in their new settlements; those *comites* or attendants were called *Vassi*, *Antrustiones*, *Leudes*, *Homines in truste regis*. The composition paid for the murder of a person of this description, the only standard by which we are enabled to judge of the rank and condition of persons in the middle ages, was triple to that paid for the murder of a common freeman. (a)

23. While the German tribes remained in their own country, they courted and preserved the favor of their *comites* by presents of arms and horses, and by hospitality. Thus Tacitus says:—*Exigunt (comites) principis sui liberalitate illum bellatorum equum, illam cruentam victricemque Trameam; nam epulæ, et quamquam incompti, largi tamen apparatus pro stipendio cedunt*. When these princes settled in the countries they had conquered, they bestowed a part of the lands allotted to them, which were known by the name of *Fiscus Regis*, or *Domanium Regis*, on their adherents, as the reward of their fidelity. These donations were originally called *Beneficia*, because they were gratuitous; in course of time they acquired the name of *Feuda*. The persons to whom this kind of property was given became thereby subject to fidelity, and the performance of military services to those from whom they received them. (b)

24. Mons. Bignon, in his notes on the *Formulæ* of Marculphus, says:—*Proprietate et Fisco duæ notantur bonorum species: et velut maxima rerum divisio quæ eo seculo recepta erat, omnia namque prædia aut propria erant, aut fiscalia. Propria seu proprietates dicebantur quæ nullius juri obnoxia erant, sed optimo maximo jure possidebantur; ideoque ad hæredes transibant. Fiscalia vero, beneficia sive fisci vocabantur, quæ a rege ut plurimum, posteaque ab aliis, ita concedebantur, ut certis legibus servitiisque obnoxia, cum vitâ accipientis finirentur*. (c)

25. The learned Muratori, in his *Antiquitates Italici Medii Ævi*, has given a Dissertation on Allodial and Feudal Tenures. He states that feuds derive their origin from the Germans, and were originally called *Beneficia*. That the ancient *Vassi* et \* *Vassali* were persons who attached themselves to \*7 kings and princes, in order to acquire the privileges to

(a) (Baluzius, Capit. Reg. Francor. Vol. II. 898, 926, 928.) Montesq. Sp. L. B. 30, c. 19.

(b) Tacitus, De Mor. Germ. c. 14. Du Cange, Gloss. voc. Fiscus. Baluz. Capit. Reg. Francor. Vol. I. 453. Vol. II. 875.

(c) (Vid. Baluz. Capit. Reg. Francor. Vol. II. 875.)

which those who formed a part of their families were entitled; and also in the hope of obtaining, from the liberality of their lords, *beneficia*, that is, the usufruct of a portion of their royal demesnes, during the lives of their lords; That whenever a person of noble birth attached himself in this manner to a prince, he took an oath of fidelity to him, and was afterwards called *Vassus* or *Vassallus*; which words occurred in a *Capitularium* of Louis the Pious, of the year 823.<sup>1</sup> That to constitute a *vassus* it was not necessary he should have a *beneficium*. That an *allodium* was an inheritance which might be alienated at the pleasure of the possessor; and the words by which it was granted usually were,—*ut proprietario jure teneat atque possideat; seu faciat inde quicquid voluerit, tam ipse quamque hæredes ipsius.* (a)

26. Although feuds were originally granted by kings and princes only, yet in a short time the great lords to whom the kings had allotted extensive tracts of land, partly from a disposition to imitate their superiors, and partly for the purpose of attaching persons to their particular fortunes, bestowed a portion of their demesnes as benefices or feuds. The greater part of the lands in Italy and France, were, however, held by an allodial tenure, till the beginning of the tenth century, when the feudal system appears to have been generally adopted in those countries.

27. As allodial property was much more desirable than feudal, such a change appears surprising; especially when we are informed that allodial property was frequently converted into feudal by the voluntary deed of the possessor. The reasons which induced the proprietors of allodial lands to convert them into feuds are thus explained by the president Montesquieu:—Those who held feuds were entitled to great privileges: the composition or fine for the commission of a crime against a feudatory was much greater than that for a person who held his lands by an allodial tenure. But the chief motive for this alteration was, to acquire the protection of some powerful lord, without which, in those times of anarchy and confusion, it was scarce possible for an individual to preserve either his liberty or his

(a) (Muratori, Antiq. Ital. Tom. I. p. 345.) Dissert. XI.

<sup>1</sup> Vid. cap. iv. ix. xxiv. Vid. etiam Capit. Regum Francor. Lib. II. cap. iv. ix. xxiv. in Leges Barbaror. Antiquæ, Vol. 3, p. 174, 175, 178.



property. These, and probably other reasons with which we are unacquainted, produced an extension of the feudal tenure over the whole western world. (a)

\*28. Feuds upon their first introduction were regulated \*8 by unwritten customs. In the year 1170 the Emperor Frederick Barbarossa directed a code of the feudal law to be compiled, which was accordingly executed, and published at Milan. It was called *Consuetudines Feudorum*; and was divided into five books, of which the first two, and some fragments of the last two, still exist, and are printed at the end of all the modern editions of the *Corpus Juris Civilis*. This work is probably no more than a collection of the customs most generally adhered to in feudal matters; and the Constitutions of the Emperors Lotharius, Conrad, and Frederick, respecting feuds. (b)

29. A *feud* is thus defined by Craig:—*Est feudum beneficium, seu benevola et libera rei immobilis, aut æquipollentis, concessio, cum utilis dominii translatione; retenta proprietate, seu dominio directo; sub fidelitate, et exhibitione servitiorum honestorum*.<sup>1</sup>

30. It was *benevola et libera concessio*; being supposed to have been originally granted from motives of mere benevolence, and not for any sum of money, or other valuable consideration.<sup>2</sup>

*Dominii utilis*.—The civilians distinguish between the *proprietas* and the *dominium utile*. The *proprietas* is the absolute property; the *dominium utile* is only the right of using the thing for a certain time.

*Sub fidelitate*.—This was the bond of connection between the lord and his vassal; and the most essential circumstance in the contract, as will be shown hereafter.

*Servitiorum*.—Services were also essential to a feud. They were generally of a military nature; but still feuds were not unfrequently granted in consideration of other services.

(a) Montesq. Sp. L. B. 31, c. 8. Hervé, Vol. I. 102.

(b) Giannone, (dell' Istoria, Regn. Nap.) Lib. 13, c. 3, § 3.

<sup>1</sup> Jus Feudale, Lib. I. Dieg. 9. 5. This definition is copied from Zasius, In Usus Feudorum Epitome, Pars I. 3, who derives it from earlier feudists. Zasii Opera, Tom. iv. p. 77.

<sup>2</sup> *Feudum enim non sub prætextu pecuniæ, sed amore et honore Domini acquirendum est. Consuetudin. Feudorum, Lib. I. tit. 27.* Nothing but immovable property could be granted as a feud. *Sciendum est autem Feudum, sive Beneficium, non nisi in rebus soli, aut solo coherentibus, aut in iis qui inter immobilia connumerantur,—posse consistere.* Ibid. Lib. II. tit. 1.

31. A modern French writer observes that it will appear, from an attentive consideration of the origin and progress of feuds, to have been the intention of the person creating the feud, to secure a constant acknowledgment of the grant as long as it subsisted; in which it differed from all other grants; and therefore that a gift of a feud ought to be defined,—“*Une concession faite à la charge d'une reconnaissance toujours subsistante, qui doit se manifester de la maniere convenue.*” (a)

32. The first and most general division of feuds was 9\* into \*proper and improper ones. Proper feuds were such as were purely military, given *militiæ gratiâ*, without price, to persons duly qualified for military service. Improper feuds were those which did not, in point of acquisition, services, and the like, strictly conform to the nature of a mere military feud; such as those that were sold or bartered for any equivalent, or granted free from all services, or in consideration of any certain return of services.

33. A feud was, however, always considered as a proper one, unless the contrary appeared, which could only be proved by a reference to the original investiture. Hence arose the maxim in the feudal law,—*Tenor investituræ inspiciendus*. But improper feuds were distinguished from proper ones by those qualities only in which they varied; for in all other respects they were considered as proper ones.

34. A *feudum ligium* was that for which the vassal owed fealty to his lord against all persons whatever, without any exception. A *feudum non ligium* was that for which the vassal owed fealty to his immediate lord; but with an exception in favor of some superior lord. A *feudum antiquum* was that which had descended to the vassal from his father, or some more remote ancestor. A *feudum novum* was that which was originally acquired by the vassal himself. A feud granted by a sovereign prince, to hold immediately of himself, with a jurisdiction, was called *feudum nobile*, and conferred nobility on the grantee. Where a title of honor was annexed to the lands so granted, it was called *feudum dignitatis*. (b)

35. Feuds were originally granted by a solemn and public delivery of the very land itself by the lord to the vassal, in the

(a) Hervé, Vol. I. 370-372.

(b) Craig. Lib. I. tit. 10, § 11. Id. § 12.

presence of the *convassalli*, or other vassals of the lord, which was called *Investitura*; and is thus described by Corvinus,—*Investitura ab investiendo dicta, quod per eam vassallus possessione quasi veste induatur.* And this ceremony was so essentially necessary to the creation of a feud, that it could not be constituted without it. *Sciendum est feudum sine investitura nullo modo constitui posse.* (a)

36. The *convassalli*, or *pares*, were the only persons who could be witnesses to the investiture; their presence was required as much for the advantage of the lord as of the tenant. Of the lord, that if the tenant was a secret enemy, or otherwise \*unqualified, he might be apprised of it, and that they \*10 might bear testimony of the obligations which he contracted. Of the tenant, that they might testify the grant of the lord, and for what services it was made. Lastly, for their own advantage, that they might know who was the tenant, and what land he held. (b)

37. As it was frequently inconvenient for the lord to go to the lands intended to be granted, the improper investiture was introduced, which was a symbolical transfer of the lands, by the delivery of a staff, a sword, or a robe; which last being the most common method among the immediate vassals of kings and princes, gave rise to the word investiture. *Investitura quidem proprie dicitur possessio: abusivo autem modo dicitur investitura, quando hasta aut aliud corporeum quidlibet porrigitur a domino, se investituram facere dicente. Quæ si quidem ab illo fiat, qui alios habet vassallos, saltem coram duobus, ex illis solemniter fieri debet; alioqui, licet alii intersint testes, investitura minime valeat.* Thus it appears that a proper investiture and possession were synonymous terms. Whenever, therefore, investiture was distinguished from possession, it was an improper one. (c)

38. The services which the vassal was bound to perform were declared by the lord at the time of the investiture, in the presence of the other vassals. But as a verbal declaration of the terms on which a feud was to be held might be forgotten or mistaken, it became usual for the tenant to procure a writing from the lord, containing the terms upon which the donation was made, witnessed by the other vassals, which was called a *breve testatum*.

(a) Consuet. Feud. I. tit. 25.

(b) Id. II. tit. 32.

(c) Consuet. Feud. II. tit. 2. Craig. Lib. II. tit. 2. § 4.

And where the lord could not conveniently come to the land, he delivered to the vassal a *breve testatum*, as an improper investiture; with a direction to some person to give him actual possession. (a)

39. A *breve testatum* being a much better security than a verbal declaration, those who acquired feuds preferred the improper investiture, with a subsequent delivery of the possession, to a proper investiture: so that in process of time the feudal writers divided an improper investiture into three parts, — a *breve testatum*, a *præceptum seisinæ*, and a *possessionis traditio*.

40. Upon the creation of a feud, a connection and union arose between the lord and his vassal, which was considered by the feudal writers as stronger than any natural tie, whatever; and which the tenant was obliged to acknowledge by immediately \*taking the oath of fidelity to the lord in these words:—*Ego Titius (vassallus) juro super hæc sancta Dei Evangelia, quod ab hac hora in antea usque ad ultimum diem vitæ meæ, ero fidelis tibi Caio Domino meo contra omnem hominem, excepto Imperatore, vel Rege.* (b)

41. The idea of this oath appears to have been taken from the obligation which existed between the German princes and their *comites*. Thus Tacitus says, — *illum defendere, tueri, sua quoque fortia gloriæ ejus assignare, præcipuum sacramentum est.* And fealty was so essentially requisite to the nature of a feud, whether a proper or an improper one, that it could not exist without it; for if lands were given without a reservation of fealty, the tenure was considered as allodial; but the oath of fealty might be dispensed with.

42. When feuds became hereditary, another ceremony was added, called *homagium* or *hominium*; which was performed in this manner:—The vassal being uncovered and ungirt, knelt down before his lord, and putting his hands within those of his lord, said, — *Devenio homo vester, de tenemento quod de vobis teneo, et tenere debeo, et fidem vobis portabo contra omnes gentes.* The lord then embraced the tenant, which completed the homage.

43. Fealty and homage have been often confounded by the feudal writers, but improperly. For *fealty* was a solemn oath

(a) Craig. Lib. II. tit. 2. § 17.

(b) Consuet. Feud. II. tit. 7.

made by the vassal, of fidelity and attachment to his lord ; whereas *homage* was merely an acknowledgment of tenure. (a)

44. In consequence of the feudal connection several *duties* arose, as well on the part of the lord as of the vassal. With respect to those which the lord owed to his vassal, it was a maxim of the feudal law, that though the vassal only took the oath of fidelity, and did homage, and the lord, on account of his dignity, took none ; yet was he equally obliged as if he had taken it, to do and forbear every thing with respect to the vassal which the vassal was bound to do and forbear towards the lord ; so that the duties of both were in most respects reciprocal. (b)

45. As for the duties which the vassal owed to the lord, they are thus described in the *Consuetudines Feudorum*,—*Qui domino suo fidelitatem jurat, ista sex in memoria semper habere debet ;—Incolume, tutum, honestum, utile, facile, possibile.* These were, however, all reduced to the two heads of *Counsel* and *Aid*. Under *Counsel* was included, not only giving faithful advice to the lord, but \* also keeping his secrets, and \* 12 attending his courts, in order to enable him to distribute justice to the rest of his tenants. (c)

46. *Aid* might either be in supporting the lord's reputation and dignity, or in defending his property. By aid to his person, the vassal was not only obliged to defend his lord against his private enemies, but also to assist him in his wars ; and feuds were in general originally granted on condition of military service, to be done in the vassal's proper person, and at his own expense.

47. The Feudal Law did not originally oblige the tenant to contribute to the lord's private necessities ; the first *feudal aid* being *purely military*. But in course of time the lords claimed and established a right to several *other aids*. The principal of which were, 1. To make the lord's eldest son a knight. 2. To marry the lord's eldest daughter. 3. To ransom the lord's person, when taken prisoner. (d)

48. Having stated the obligations of the lord and vassal to each other, I shall now proceed to inquire into the nature of the estate or interest which each of them had in the land. With

(a) (Craig. Lib. II. tit. 12. § 20. Ib. Lib. I. tit. 11. § 11.) (b) Wright, Ten. 43, 44.

(c) Lib. II. tit. 6.

(d) Du Cange, Gloss. voc. Auxilium.

respect to the *estate of the vassal*, we must recollect that as the original donations made by the French kings to their *fideles* and *leudes* were of a temporary nature, and as nothing more than the usufruct was given to them; so in the Feudal Law the *proprietas* was allowed to remain in the lord, and the vassal had only the *ususfructus* or *dominium utile*; that is, a right to take and enjoy the profits of the land, as long as he performed the services due to the lord.

49. As to the duration of feuds, they were originally precarious, and might be resumed at the lord's pleasure. They were next granted for one year, afterwards for life. In course of time it became unusual to reject the heir of the last tenant, if he was able to perform the services: and at length feuds became hereditary, and descended to the posterity of the vassal.<sup>1</sup> (a)

50. In the first ages of the Feudal Law, the *vassal could not alien the feud* without the consent of the lord; neither could he mortgage, or otherwise subject it to the payment of his debts. It appears however from the *Consuetudines Feudorum* that feuds were frequently aliened: but by a constitution of the emperor Lotharius, reciting that the alienation of feuds had proved extremely detrimental to the military services which were  
13\* due from the \*vassals, they were absolutely prohibited from alienating their feuds without the consent of their lords; which was confirmed by a law of the emperor Frederic II. (b)

51. The consent of the lord was seldom given without his receiving a present; from whence arose a general practice of paying the lord a sum of money for permission to alien a feud.

52. There was however a mode of disposing of part of a feud, which does not appear to have been comprehended in the constitutions of Lotharius or Frederic. This was by a *grant from the vassal* of a *portion* of his feud to a stranger, to be *held of himself*, by the same services as those which he owed to his lord. (c)

53. This practice, which was called *subinfeudation*, became

(a) Consuet. Feud. I. tit. 1.      (b) Lib. II. tit. 55.      (c) Consuet. Feud. II. tit. 34. s. 2.

<sup>1</sup> This notion of the original character of feudal property, and of its becoming hereditary only by degrees, after a long lapse of time, has been controverted by Mr. Spence, upon the ground of documentary evidence to the contrary; as has been stated in a previous note to § 19.

extremely common in France during the eleventh and twelfth centuries; but was prevented by an ordonnance of Philip Augustus in 1210, which directed that where any estate was dismembered from a feud, it should be held of the chief lord. (a)

54. With respect to the *estate* or interest which *the lord* had in the lands, after he had granted them out as a feud, it consisted in the *proprietas*, together with a feudal *dominium* or seignior, and a right to fealty, and all the other services reserved upon the grant. And in case of failure in any of these, the lord might enter upon and take possession of the feud.

55. As the feudatory could not alien the feud without the consent of the lord, so neither could the lord alien or transfer his seignior to another without the consent of his feudatory. *Ex eadem lege descendit, quod dominus, sine voluntate vassalli, feudum alienare non potest.* For the obligations of the lord and vassal being mutual, the vassal was as much interested in the personal qualities of his lord, as the lord was in those of his vassal. (b)

56. There was another *obligation*, on the part of *the lord*, of very considerable importance; namely, that *in case the vassal was evicted* out of the feud, the lord was obliged to give him another feud of equal extent, or else to pay him the value of that which he had lost.<sup>1</sup> (c)

(a) Hervé, Vol. I. 101.

(b) Wright, Ten. 30. Consuet. Feud. II. tit. 34. s. 1.

(c) Consuet. Feud. II. tit. 25.

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<sup>1</sup> This doctrine of the feudal law is the foundation of a wide diversity of opinion existing at this day, in regard to the proper rule of damages in actions on covenants of warranty. In some of the United States, the rule is to give the consideration-money with interest; in others, the value of the land at the time of eviction. In the former States, the Courts regard the modern covenant of warranty as a substitute for the old real covenant, upon which, in a writ of *warrantia chartæ*, or upon voucher, the value of the other lands to be recovered was computed as it existed at the time when the warranty was made; and accordingly they retain the same measure of compensation for the breach of the modern covenant. But in the latter States, the Courts view the covenant as in the nature of a personal covenant of indemnification, in which, as in all other cases, the party is entitled to the full value of that which he has lost, to be computed as it existed at the time of the breach. The consideration-money and interest, is adopted as the measure of damages, in *New York*; *Staats v. Ten Eyck*, 3 Caines, R. 111; *Pitcher v. Livingston*, 4 Johns. 1; *Bennett v. Jenkins*, 13 Johns. 50; [*Baxter v. Ryerss*, 13 Barb. 267;]—and in *Pennsylvania*; *Bender v. Fromberger*, 4 Dall. 441; [*Bitner v. Brough*, 11 Penn. State R. (1 Jones), 127; and in *Maryland*. See *Marshall v. Haney*, 9 Gill, 251;]—and in *Virginia*; *Stout v. Jackson*, 2 Rand. 132;—and in *North Carolina*; *Cox v. Strode*, 2 Bibb. 272; *Phillips v. Smith*, 1 N. Car. Law Repos.

57. Sir Martin Wright doubts whether the obligation of the lord to protect and defend his vassal made him anciently liable on eviction, without any fraud or defect in him, to make a compensation for the loss of the feud; inasmuch as it could hardly be imagined that while feuds were precarious, and held  
 14 \* at the \* will of the lord by whom they were granted, and while they were generously given without price, the lord should be subject to such a loss; and was of opinion that the lord's obligation to compensate the vassal, in case of eviction, only prevailed as to improper feuds, for which a price had been paid, or an equivalent stipulated. (a)

58. Craig agreed in this respect with Sir Martin Wright. They, however, both acknowledge, that none of the ancient feudal writers make any such distinction; but that all admit the lord's obligation to compensate the vassal on eviction to have been general. (b)

59. We have seen, that although feuds were originally granted at will only, yet in course of time they became *descendible and hereditary*. It will, therefore, be necessary to inquire into the rules of descent that were established by the feudal law, where no particular mode of descent was directed by the original grant: for in such case the maxim was,—*Tenor investituræ est inspicendus*.

60. The first rule, was, that the descendants of the person to whom the feud was originally granted, and none others, should

(a) Wright, Ten. 38.

(b) (Craig. Lib. II. tit. 4. § 1, 2.)

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475; *Wilson v. Forbes*, 2 Dev. R. 30;—and in *South Carolina*; *Henning v. Withers*, 2 S. Car. Rep. 584; *Ware v. Weathnall*, 2 McCord, 413;—and in *Ohio*; *Backus v. McCoy*, 3 Ohio R. 211, 221;—and in *Kentucky*; *Hanson v. Buckner*, 4 Dana, 253; [see also *Thompson v. Jones*, 11 B. Mon. 365;]—and in *Missouri*; *Tapley v. Lebeaume*, 1 Miss. R. 552; *Martin v. Long*, 3 Miss. R. 391;—and in *Illinois*; *Buckmaster v. Grundy*, 1 Scam. 310;—[and in *Wisconsin*; *Rich v. Johnson*, 1 Chand. 19.] In *Indiana*, the question has been raised, without being decided. *Blackwell v. Justices of Lawrence Co.* 2 Blackf. 147. The value of the land at the time of eviction, has been adopted as the measure of damages, in *Massachusetts*; *Gore v. Brazier*, 3 Mass. 523; *Caswell v. Wendell*, 4 Mass. 108; *Bigelow v. Jones*, Ib. 512; *Chapel v. Bull*, 17 Mass. 213; [see, also, *Batchelder v. Sturgis*, 3 Cush. 201, 205; *Cornell v. Jackson*, Ib. 506, 510;]—and in *Maine*; *Swett v. Patrick*, 3 Fairf. 1;—and in *Connecticut*; *Sterling v. Peet*, 14 Conn. 245;—and in *Vermont*; *Drury v. Strong*, D. Chipm. R. 110; *Park v. Bates*, 12 Verm. 381;—and in *Louisiana*; *Bissell v. Erwin*, 13 Louis. R. 143. See, also, 4 Kent, Comm. 474, 475. [In *Alabama* the consideration paid, interest and expenses of suit are allowed. *Griffin v. Reynolds*, 17 How. U. S. 609.]



inherit; because, as the personal ability of the first acquirer to perform the military duties and services reserved was the motive of the donation, it could only be transmitted by him to his lineal descendants. (a)

61. In consequence of this rule the ascending line was, in all cases, excluded. Hence it is laid down in the *Consuetudines Feudorum*,—*Successionis feudi talis est natura, quod ascendentes non succedunt*. And a modern feudist has said, —*Jus tamen feudale, ascendentium ordine neglecto, solos descendentes et collaterales admittit. Quoniam qui feudum accipit, sibi et liberis suis, non parentibus prospicit*. Whereas in allodial property the ascending line was capable of inheriting. (b)

62. All the sons succeeded equally, as was the case in France, even respecting the succession to the crown, during the first and part of the second race. But the frequent wars occasioned by these partitions caused a regulation that kingdoms should be considered as impartible inheritances, and descend to the eldest son.

63. In imitation of the sovereignty, the same alteration was made in the descent of the great feuds; for by a constitution of the Emperor Frederic, honorary feuds became indivisible; and \* they, as also the military feuds, began to descend \* 15 to the eldest son, because he was sooner capable of performing the military service than any of his brothers. (c)

64. Females were originally excluded from inheriting feuds, not only on account of their inability to perform the military services, but also lest they should carry the feud by marriage to strangers or enemies. (d)

65. The rule, that none but the descendants of the first feudatory could inherit, was so strictly adhered to, that in the case of a *feudum novum*, the brother of the first acquirer could not succeed to his brother, because he was not descended from the person who first acquired the feud. But in the case of a *feudum antiquum*, a brother, or other collateral relation, who was descended from the first acquirer, might inherit. (e)

(a) Craig. Lib. T. tit. 10. s. 11. (Lib. II. tit. 13. § 46, 47. Id. tit. 15. § 10.)

(b) Lib. II. tit. 50. (Id. tit. 18.) Corvinus, Lib. II. tit. 4. (Craig. Lib. II. tit. 13. § 46, 47. Monte Sp. L. B. 31. ch. 34.)

(c) (Consuet. Feud. Lib. II. tit. 55.)

(d) Consuet. Feud. Lib. I. tit. 8<sup>h</sup>. (Struvius, Syntag. Jur. Feud. c. IX. § 8.)

(e) Consuet. Feud. Lib. I. tit. 1. s. 2.

66. A mode was afterwards adopted of letting in the collateral relations of the first acquirer of a feud, by granting him a *feudum novum*, to be held *ut antiquum*, that is, with all the qualities of an ancient feud, derived from a remote ancestor; and then the collateral relations were admitted, however distant from the person who was last possessed of the feud. (a)

67. To restrain this general right of inheritance in all the collateral relations, a new kind of feud was invented, called a *feudum talliatum*, which is thus described by Du Cange:—*Feudum talliatum dicitur, verbis forensibus, hæreditas in quamdam certitudinem limitata; seu feudum certis conditionibus concessum, verbi gratiâ, alicui et liberis ex legitimo matrimonio nascituris. Unde si is cui feudum datum est moriatur absque liberis, feudum ad donatorem redit. Talliare enim est in quamdam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare.*<sup>1</sup> (b)

68. It is observable that the principles of the feudal descent were peculiar to that tenure, and differed entirely from those of succession established by the Roman law; in which the heir was a person instituted by the ancestor, or appointed by the law, to represent the ancestor in all his civil rights and obligations; whereas, in the feudal law, the heir succeeded not under any supposed representation to the ancestor, but as related to him in blood, and designated, in consequence of that relationship, by the terms of the investiture, to succeed to the feud.

69. When feuds became descendible, the lord, upon the death of every tenant, claimed the right of granting a new  
16\* *investiture* \* to the successor, without which he could not enter into possession of the feud. This showed that the right of inheriting was originally derived from the bounty and acquiescence of the lord; and these investitures were evidence of the tenure, as well as of the services that were due for the feud.

70. It was also customary for the lord to demand some present from the heir, upon granting him investiture, which in course of

(a) Craig. Lib. I. tit. 10. s. 11. (13, 14, 15.)

(b) Craig. Lib. I. tit. 10. s. 17. (25.)

<sup>1</sup> *Talliare*, dividere, partiri, disponere. Vid. Carpentier, Glossarium, voc. Talliare, 2.

time became part of the profits of the feud. It was called *Relevium*, and is thus described by a feudal writer :—*Relevium est præstatio hæredum, qui cum veteri jure feudali non poterant succedere in feudis, caducam et incertam hæreditatem relevabant; solutâ summâ vel pecuniâ, vel aliarum rerum, pro diversitate feudorum.* (a)

71. As feuds were originally granted on condition of military or other services, it was deemed just that where there was no person capable of performing those services, the feud should return to the lord. Therefore, where a vassal died without heirs, the lord became entitled to the feud by *escheat*.

72. Feuds having been at all times considered as voluntary donations, it was very soon established that every act of the *vassal* which was contrary to the connection that subsisted between him and his lord, and to the fidelity he owed him, or by which he disabled himself from performing his services, should operate as a *forfeiture of the feud*.

73. If the vassal omitted to require an investiture from the heir of his lord, for a year and a day after the death of the lord, and to take the oath of fealty to him, he lost his feud. So in the case of the vassal's death, if his heir did not require investiture from the lord within that time, he forfeited his feud. (b)

74. If the vassal refused to perform the services which were reserved upon the investiture, he forfeited his feud. *Non est alia justior causa beneficii auferendi, quam si id, propter quod beneficium datum fuerit, hoc servitium facere recusaverit; quia beneficium amittit.* (c)

\*75. If the vassal alienated the feud, or did any act by which its value was considerably diminished, he forfeited it. *Si vassallus feudum dissiparet, aut insigni detrimento deterius faceret, privabitur.* (d) \*17

76. If the vassal denied that he held his feud of the lord, by saying that he held it of some other person, or denied that the land was held by a feudal tenure, he forfeited it. (e)

77. Every species of felony operated as a forfeiture of the feud; being the highest breach of the vassal's oath of fealty.

(a) Schilt. Cod. s. 52.

(b) Consuet. Feud. Lib. II. tit. 23, 24.

(c) Consuet. Feud. Lib. II. tit. 24. § 2.

(d) (Consuet. Feud. Lib. I. tit. 21. Zasius, In Usus Feud. Pars 10. § 54.)

(e) Craig, Lib. III. tit. 5. s. 2.

78. The feudal lord was equally bound to observe the terms of relation on his part; and, therefore, if he neglected to protect and defend his tenant, or did any thing that was prejudicial to him, or injurious to the feudal connection, he forfeited his seigniorship. (a)

79. The feudal lord had not only a right to the service of his vassals in war, but had also the privilege of determining their disputes in time of peace. Thus we read in the *Consuetudines Feudorum*,—*Si inter duos vassallos de feudo sit controversia, domini sit cognitio, et per eum controversia terminetur. Si vero inter dominum et vassallum lis oriatur, per pares curiæ, a domino sub fidelitatis debito conjuratos terminetur.* (b)

80. The origin of the feudal jurisdiction is said to be derived from the following circumstances:—By the laws of all the northern nations every crime, not even excepting murder, was punished by a pecuniary fine called *fredum*. In the infancy of the northern governments, the chief occupation of a judge consisted in ascertaining and levying those fines, which formed a considerable part of the public revenue. When extensive tracts of land were granted as feuds, the privilege of levying those fines was always included in the grant, with a right to hold a court for the purpose of ascertaining them; from whence followed a jurisdiction over the vassals, both in civil and criminal matters. (c)

81. To all the nations descended from the Germans, justice was originally administered in their general assemblies; nor did the king or chieftain pronounce sentence till he had consulted those persons who were of the same rank with the accused, without whose consent no judgment could be given. In 18 \* imitation \* of this practice, every feudal lord had a court, in which he distributed justice to his vassals; and every freeman who held lands of him was bound, under pain of forfeiting his feud, to attend his court, there to assist his lord in determining all disputes arising between his vassals. And as all the tenants were of the same rank, and held of the same lord, they were called *pares curiæ*. (d)

(a) Consuet. Feud. Lib. II. tit. 26, 47.

(b) Lib. I. tit. 18. (Lib. II. tit. 55.)

(c) Montesq. Sp. L. B. 30. c. 18. (20.) Hervé, Vol. I. 222—252. Robertson's Cha. V. Vol. I. 67, 365.

(d) Hervé, Vol. I. s. 263. (Craig. Lib. II. tit. 11. § 18.) Id. tit. 2. § 24. 2 Bl. Comm. 54.

82. This practice appears to have been established so long ago as in the reign of the emperor Conrad, A. D. 920, of whom there exists the following law:—*Statuimus, ut nullus miles episcoporum, abbatum, &c. vel hominum, qui beneficium de nostris publicis bonis, aut de ecclesiarum prædiis, &c. tenent, &c. sine certâ et convictâ culpâ, suum beneficium perdat, nisi secundum consuetudinem antecessorum nostrorum, et judicium parium suorum.* (a)

(a) (Consuet. Feud. Lib. V. tit. 1.)

## CHAP. II.

## ANCIENT ENGLISH TENURES.

- SECT. 1. *Introduction of Feuds.*  
 5. *Division of Tenures.*  
 7. *Tenure in Capite.*  
 12. *Statute of Quia Emptores.*  
 13. *Tenure by Knight Service.*  
 17. *Homage.*  
 20. *Fealty.*  
 22. *Fruits of Knight Service.*  
 23. *Aids.*

- SECT. 25. *Reliefs.*  
 26. *Primer Seisin*  
 28. *Wardships.*  
 30. *Marriage.*  
 32. *Fines for Alienation.*  
 33. *Escheat.*  
 34. *Tenure by Grand Serjeanty.*  
 35. *Abolition of Military Tenures.*

SECTION 1. It is now universally admitted that the *feudal system*, with all its fruits and services, as established in Normandy, was first *introduced* into England by William the Conqueror, in those possessions of the Saxon Thanes which were granted by him to his followers, immediately after the battle of Hastings; and that about the twentieth year of his reign, the feudal system was formally and generally adopted. (a)

2. In consequence of this event it became a fundamental maxim, or rather fiction of English law, that all the lands in the kingdom were originally granted out by the kings; and held mediately or immediately of the crown, in consideration of certain services to be rendered by the tenant. The thing holden was therefore called a tenement, the possessors thereof, tenants, and the manner of their possession, a tenure. And Lord Coke says:—"In the law of England we have not properly *allodium*, that is, any subject's land that is not holden." <sup>1</sup> (b)

(a) Spelman on Feuds, *per tot.* Wright Ten. 68.

(b) 1 Inst. 1. a. Id. 1. b.

<sup>1</sup> The foundation of European title to the soil of America was very fully discussed by Marshall, C. J., in the celebrated case of *Johnson v. McIntosh*, 8 Wheat. 543; in

3. Although feuds were not originally hereditary,<sup>1</sup> in those countries where the feudal law was first established, yet we find

which the Court held that the titles of the European nations, as between themselves, rested on discovery; subject to the right of occupancy only in the aboriginal inhabitants, for present use, subordinate to the ultimate dominion of the discoverers, who had the right of preëmption from the aborigines, and the right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. And see *Martin v. Waddell*, 16 Pet. 367; *Rogers v. Jones*, 1 Wend. 237; *Gough v. Bell*, 10 Law Rep. 505. All the institutions in the United States now recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. It is true that Indian deeds of an early date have in some instances been admitted as the sole foundation of a title in fee simple; but none in Massachusetts, subsequent to the last prohibitory statute of 1731, forbidding all purchases from the natives without license from the legislature. Similar prohibitory acts were passed, in that and in some other provinces, at an earlier period. It is now the settled and fundamental doctrine, that all valid individual title to land within the United States, is derived from the grant of our own local governments, or from that of the United States, or from the crown, or the royal chartered provincial governments. See 3 Kent, Comm. 378. 1 Story on the Constitution, b. 1. ch. 1. *Jackson v. Ingraham*, 4 Johns. 163. *De Armas v. Mayor, &c., of New Orleans*, 5 Miller, Louis. Rep. 132. This great feudal principle, that all lands are held of the sovereign, being thus acknowledged, the remark of Lord Coke, quoted in the text, seems in strictness to apply as justly to the United States as to England, we having no lands which are properly allodial, that is, which are not holden. But this feudal principle was never admitted here as a feature of political government, but only as the source of the rules of holding and transmitting real property between man and man. The military and oppressive attributes of the feudal system, which were formally abolished by the Stat. 12 Car. 2., had already become virtually dead in England, before the passage of that act, and were never supposed to have been brought into this country by the first colonists. The doctrine of feudal fealty, however, was retained; but the right to exact the oath was applied only to the sovereign, and is resolved into the oath of allegiance, which every citizen may be required to take. 3 Kent, Comm. 512. By the original charters, under which most of the colonies were first settled, the lands were granted by the crown to the patentees, to hold in free and common socage. Such were the charters of *Maine, Massachusetts*,<sup>2</sup> *Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, the Carolinas, and Georgia*. In some other States, all tenures were turned into free and common socage, by express statute; as, in *New York*, by the act of May 13, 1691; 3 Kent, Comm. 511; and in *New Jersey*, *Elmer's Dig.* p. 82. To this tenure, also, fealty is admitted to be incident, at least in fiction of law, and for the purpose of upholding other rights; and on this the right to distrain for rent is in some States recognized as grounded. *Cornell v. Lamb*, 2 Cowen, R. 652. 656; 3 Kent, Comm. 462. But in some other States, this incident of tenure in socage has never been admitted, the remedy for rent being only by action at law. *Wait's case*, 7 Pick. 105. In others, it is still a mooted question whether the right of distress exists, without an express stipulation to that effect, in the lease. 4 Am. Jur. 233—262. But this ques-

<sup>1</sup> But see, *contra*, Spence on Equitable Jurisdiction, Vol. I. p. 44—46. Ante, ch. 1. § 19. note.

<sup>2</sup> [For a learned and able discussion of the rights of riparian proprietors in Massachusetts, see *Commonwealth v. Alger*, 7 Cush. 53.]

that feuds were from the beginning hereditary, where lands held by an allodial tenure were voluntarily converted into feuds.

Thus Basnage, in his Commentary on the customs of 20\* Normandy, says, \* that when Rollo became master of that province, he granted a considerable portion of it to his companions, and to gentlemen of Brittany, as hereditary feuds. That he also recalled a number of the ancient inhabitants who had held their estates by hereditary right, and restored them to their possessions in as full and ample a manner as they had held them under the kings of France. (a)

4. When William I. established himself in England, he certainly granted to his followers the inheritance of all the estates which he distributed among them, for some of those estates are possessed by their descendants at this day. And when he persuaded the Anglo-Saxon proprietors to hold their lands by a feudal tenure, he as certainly allowed them to retain the inheritance.

5. Sir W. Blackstone states that there seem to have subsisted among our ancestors *four principal species of lay tenures*, to which all others might be reduced; the grand *criteria* of which were the natures of the several *services* or renders that were due to the lords from their tenants. The services, in respect of their quality, were either free or base; in respect of their quantity,

(a) Tom. I. 153. edit. 1778. (Art. 102. p. 150. edit. 1709.)

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tion has become of little practical importance, the remedy by distress, in those States in which it is used, being now recognized and regulated by statutes. It is true that in some of the United States, statutes have been enacted, expressly declaring all their lands allodial. See Rev. LL. *Connecticut*, 1838, p. 389. tit. 57. ch. 1.; LL. *New Jersey*, Feb. 18, 1795. Elmer's Dig. p. 82.; LL. *New York*, Sess. 10. ch. 36. 1 Rev. Stat. N. Y. p. 718. § 3. 1 LL. N. York, p. 71. ed. 1813, adopted into the Laws of the Territory of *Michigan*, p. 393. But in these cases, the term is presumed to have been used in its more popular sense, importing merely the actual freedom of the lands from feudal burdens and exactions, except those due to the State; and not as intended to change any of the established rules of acquiring and transmitting real property. See 3 Kent, Comm. 509—514. 4 Kent, Comm. 2—4. *Matthews v. Ward*, 10 Gill & Johns. 450. 451. The doctrines of escheat, and of forfeiture for waste, are plainly of feudal origin, though recognized and regulated by statutes. 4 Kent, Comm. 76—84. 2 Reeve, Hist. Eng. Law, p. 73. 148. Si vassallus feudum dissiparet, aut insignia detrimento deterius faceret, privabatur. Zasius, In Usus Feud. Pars 10. § 54. Tom. IV. p. 99. Wright, Ten. 44. Feudum, deficiente herede, ad dominum concedentem revertitur. Crag. Jus. Feud. Lib. II. tit. 15. § 10. But in some States they have been held to take effect by force of statutes only. *Desilver's case*, 5 Rawle, 112, 113. And see, as to waste, 2 Bl. Comm. 72, 73. 2 Inst. 300.



and time of executing them, were either certain or uncertain. *Free services* were such as were not unbecoming the character of a soldier or a freeman to perform ; as to serve under the lord in the wars, to pay a sum of money, and the like. *Base services* were such as were fit only for peasants, and persons of servile rank ; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence ; as to pay a stated annual rent, or to plough such a field for three days. The uncertain depended on unknown contingencies ; as to do military service in person, or pay an assessment in lieu of it, when called upon, which are free services. Or to do whatever the lord should command, which is a base or villein service. (a)

6. From the various combinations of these services arose the four kinds of lay tenure which subsisted in England till the middle of the seventeenth century ; and three of which subsist to this day. First, where the service was free, but uncertain, as military service, that tenure was called chivalry, *servitium militare*, or knight service. Secondly, where the service \*21 was not only free, but also certain, as by fealty only, by rent, and fealty, &c., that tenure was called *liberum socagium*, or free socage. These were the only free holdings or tenements ; the others were villeinous or servile. As, thirdly, where the service was base in its nature, and uncertain as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum* ; or it might be still called socage, from the certainty of its services, but degraded by their baseness into the inferior title of *villanum socagium*, villein socage. (b)

7. Although in the first instance all the lands in England were held immediately of the king, yet in consequence of the practice of subinfeudation, which prevailed in those times, the king's chief tenants granted out a considerable part of their estates to inferior persons, who were called *valvasores*, to hold of themselves, by which mesne, or middle tenures were created ;

(a) 2 Bl. Com. 60.

(b) Idem.

from whence arose several distinctions, as to the manner in which lands were held.

8. Estates might be held of the king, or of a subject in two ways, either as of his person, or as of an honor or manor of which he was seised; and every holding of the person was, strictly speaking, *a tenure in capite*: but still that expression was always confined to a holding of the king in right of his crown and dignity; or, as it was formally expressed, *ut de coronâ*, or *ut de personâ*; for whenever the holding was of the person of a subject, it was called tenure in gross. (a)

9. Tenure *in capite* was in general so inseparable from a holding of the person of the king, that if lands were granted by his majesty, without reserving any tenure, or *absque aliquo inde reddendo*, or the like; there the lands, by operation of law, should be held of the king *in capite*, because that tenure was the most advantageous to the crown. (b)

10. Where an honor or barony originally created by the crown returned to the king by forfeiture or escheat, the persons who held their lands of such honor or barony became tenants to the crown, and were said to hold of the king *ut de honore de A.*, &c.

This distinction of tenure was extremely important to 22\* those who \*held of such honors or baronies; for by an article of the *Magna Charta* of King Henry III. it was declared that persons holding of honors escheated, and in the king's hands, should pay no more relief nor perform more services to the king, than they should to the baron, if it were in his hands. (c)

11. It followed that where lands were held of the king as of an honor, castle, or manor, and escheated to the crown, the tenure was not *in capite*. And where lands were granted by the king to hold of him, as of his manor of A., this was not a tenure *in capite*. (d)

12. In the case of private individuals, any person might formerly, by a grant of land, have created a tenure, as of his person, or as of any honor or manor whereof he was seised. If no tenure was reserved, the feoffee would hold of the feoffor, by the same services by which the feoffor held over. This doctrine having been found to be attended with several inconveniences,

(a) 1 Inst. 108. a. 12 Rep. 135. Fitz. N. B. (5).

(b) Lowe's case, 9 Rep. 122.

(c) 2 Inst. 64.

(d) Fitz. N. B. 5. K. Dyer 44. 1 Inst. 108. a. Stat. 1 Ed. 6. c. 4.

was altered in the reign of King Edward I. by the statute of *Quia Emptores Terrarum*,<sup>1</sup> which directs that upon all sales or feoffments of lands, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it.† These provisions not extending to the king's tenants *in capite*, the like law respecting them was declared by the statutes of *Prærogativa Regis*, 17 Edw. 2. c. 6. and 34 Edw. 3. c. 15. by which last all subinfeudations previous to the reign of Edward I. were confirmed; but all subsequent to that period were left open to the king's prerogative. (a)

13. The first and most honorable kind of *tenure was by knight service, servitium militare*. To make a tenure of this kind a determinate quantity of land was necessary, which was called a knight's fee, *feudum militare*, the measure of which is by some ancient writers, estimated at eight hundred acres of land, and by others at six hundred and eighty. But Lord Coke was of opinion, that a knight's fee was to be esteemed \*according to the quality, and not the quantity of the \*23 land; and that 20*l.* a year was the qualification of a knight. (b)

14. Every person holding by knight service was obliged to attend the lord to the wars, if called upon, on horseback, armed as a knight, for forty days in every year, at his own expense. This attendance was his *redditus*, or return for the land he held. If he had only half a knight's fee, he was only bound to attend for twenty days, and so on in proportion. (c)

15. The personal attendance in knight's service growing troublesome and inconvenient, the tenants found means of compounding for it; first by sending others in their stead, afterwards by making a pecuniary satisfaction to their lords in lieu of it. At last this pecuniary satisfaction was levied by assessments, at so much for every knight's fee; from whence it acquired the name of *scutagium*, or *servitium scuti*; *scutum* being then a

(a) 2 Inst. 501. 18 Ed. 1. c. 1. 1 Inst. 98. b. Vide tit. 32. c. 1.

(b) 1 Inst. 69. a. Mad. Exch. 4to. Vol. I. 321.

(c) Mad. Id. 653.

<sup>1</sup> This statute was never recognized or held in force in Pennsylvania. *Ingersoll v. Sargent*, 1 Whart. 337.

† The idea of this law was probably taken from the ordonnance of Philip Augustus which has been mentioned in the preceding chapter, § 53.

well known name for money, and in Norman French it was called *escuage*. (a)

16. As *escuage* differed from knight service in nothing but as a compensation differs from actual service, it is frequently confounded with it. Thus Littleton must be understood when he says\* that tenant by homage, fealty, and *escuage*, was tenant by knight service. (b)

17. Tenure by knight service had all the marks of a strict and regular feud. It was granted by words of pure donation—*dedi et concessi*: was transferred by investiture, or delivering corporal possession of the land, and was perfected by *homage* and fealty. Thus every person holding a feud by this tenure was bound to do homage to his lord, for which purpose he was to kneel down before him and say, “I become your man from this day forward, of life and limb, and of earthly worship; and unto you shall be true and faithful, and bear you faith for the tenements that I claim to hold of you; saving the faith that I owe unto our sovereign lord the king.” And the lord being seated, kissed him. (c)

18. *Homage* was properly incident to knight service, because it concerned service in war. It must have been done in person, not by attorney; and the performance of it, where it was due, materially concerned both the lord and the tenant in point of interest and advantage. To the lord it was of consequence,

because till he had received homage of the heir, he was  
24\* not \*entitled to the wardship of his person or estate.

To the tenant the homage was equally important; for anciently every kind of homage, when received, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lord paramount; and to defend his title to the land against all strangers. (d)

19. The words *homagium* and *dominium* are directly opposed to each other, as expressing the respective situations and duties of the lord and vassal; which, in conformity to the principles of the feudal law, were reciprocal. Thus Glanville says,—*mutua quidem debet esse domini et homagii fidelitatis connexio, ita quod quantum homo debet domino, ex homagio; tantum illi debet dominus, præter solam reverentiam*. (e)

(a) *Mad. Exch.* 652.

(b) *S.* 95.

(c) *Lit. s.* 85. *Stat.* 17. *Ed.* 2.

(d) 1 *Inst.* 66. b. 67. b. n. l. 2 *Inst.* 10.

(e) *Lib.* 9. c. 4.

20. All tenants by knight service were also subject to *fealty*, which is thus described by Littleton, s. 91.—“And when a freeholder doth fealty, he shall hold his right hand upon a book, and shall say thus:—know you this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the time assigned. So help me God and his saints.” And he shall kiss the book.

21. Fealty and homage were perfectly distinct from each other; for though fealty was an incident to homage, and ought always to have accompanied it, yet fealty might be by itself, being something done when homage would have been improper; so that homage was inseparable from fealty, but fealty was not so from homage. (a)

22. The tenure by *knight service*, being the most honorable, was also the most favorable to the lord, for it drew after it these *five fruits* or consequences, as inseparably incident to it; namely, *aids*, *relief*, *primer seisin*, *wardship*, and *marriage*.

23. With respect to *aids*, they were the same as those established on the continent; namely, to make the lord's eldest son a knight, to marry the lord's eldest daughter, and to ransom the lord's person when taken prisoner. These aids were introduced into England from Normandy, where they appear to have been established before the conquest. (b)

\*24. Aids of this kind were originally uncertain; but \*25 by the statute of Westmin. I. the aids of inferior lords were fixed at twenty shillings for every knight's fee, for making the lord's eldest son a knight, or marrying his eldest daughter. The same was done with regard to the king's tenants *in capite*, by the statute 25 Edw. 3. c. 11. As to the aid for the ransom of the lord's person, not being capable of any certainty, it was never ascertained. (c)

25. Upon the death of every tenant the lord claimed a sum of money from his heir, as a fine for taking up the estate that lapsed by the death of the ancestor, which was called a *relief*. This practice was also adopted from the laws of Normandy,

(a) 1 Inst. 68. a. Wright. 55. n.

(b) (Le Grand Coustumier, c. 35. fol. 57. b.)

(c) 1 Ed. 1. c. 36. 2 Inst. 231. 13 Rep. 26.

where reliefs were reduced to a certainty at the time when the customs of that province were collected. (a)

26. Where the king's tenant died seised, the crown was entitled to receive of the heir, if he were of full age, an additional sum of money, called *primer seisin*. It does not appear when this right was first established: but in the stat. of Marlbridge, 52 Hen. 3. c. 16. it is thus mentioned:—*De hæredibus autem qui de domino rege tenent in capite, sic observandum est; quod dominus primam inde habeat seisinam, sicut prius inde habere consuevit.* The \* king's right to primer seisin is also declared in the statute *De Prerogativâ Regis*. And it was settled that the king should receive on this account one whole year's profit of the lands. (b)

27. Primer seisin was only incident to the king's tenant *in capite*, not to those who held of inferior or mesne lords. "It seems (says Sir W. Blackstone) to have been little more than an additional relief, founded on this principle, that by the ancient law of feuds, immediately upon the death of a vassal, the lord was entitled to enter, and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture; during which interval the lord was entitled to the profits." (c)

28. These payments were only due when the heir was of full age. If the heir was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to *wardship*,† which consisted in having the custody of the body and lands of the heir, without being accountable for the profits, till the male heir attained twenty-one, and the female sixteen.

29. The doctrine of wardships was taken from the customs of Normandy, in which it was called *garde noble*. (d)

Of the various hardships which arose from the adoption of the feudal law, wardship was the greatest, and of which there was most complaint: for the object of some of the first chapters of *Magna Charta* was, to regulate the conduct of the lords in this respect, and to restrain them from wasting and destroying the estates of their wards.

(a) Grand Coust. c. 34. (fol. 56. b.) (b) 2 Inst. 134. 17 Ed. 2. c. 8. 2 Inst. 9. (c) 2 Comm. 66. (d) Grand Coust. c. 33. fol. 53. Basnage, Vol. I. 826. (306. art. 213. pref.)

[† Writ of right of ward abolished after 1st June, 1835, by Stat. 3 and 4 Will. 4. c. 27. s. 36.]

30. By the customs of Normandy female wards were directed to be married with the advice and consent of the lord and of their relations. In imitation of this practice, it appears to have been settled in England, soon after the establishment of the Normans, that the consent of the lord was necessary to the *marriage* of his female wards, for which the lords usually required a sum of money. In the charter of King Henry I. that monarch engages to waive that prerogative; this being disregarded, it was provided by the first draught of the *Magna Charta* of King \* John, that heirs should be married without dis- 27 \* paragement, by the advice of their relations. But in the charter of King Henry III. the clause is merely that heirs shall be married without disparagement. (a)

31. Soon after, the king and the great lords established a right to consent to the marriage, not only of their female, but of their male wards: for as nothing but disparagement was restrained, they thought themselves at liberty to make all other advantages they could. Afterwards this right of selling the ward in marriage, or else receiving the price or sale of it, was expressly declared by the statute of Merton. (b)

32. All lands held by a feudal tenure were originally unalienable, without the license of the lord; from whence arose *finés for alienation*, of which an account will be given hereafter. (c)

33. Where the tenant died without heirs, by which there was no person to perform the services, the land returned to the lord as an *escheat*, in conformity to the rules of the feudal law. (d)

34. There was a species of tenure called *grand serjeanty*, which was considered superior to knight service; whereby the tenant was bound, instead of serving the king generally in his wars, to do him some special honorary service in person. Thus where the king gave lands to a man to hold of him by the service of being marshal of his host, or marshal of England, or high steward of England, or the like, these were grand serjeanties. So if lands were given to a man to hold by the service of carrying the king's sword at his coronation, or being his carver or butler, these were called services of honor, held by grand serjeanty. (e)

\*35. The oppressions arising from military tenures, \*28

(a) Grand Coust. c. 33. (fol. 55. o.)

(b) 20 Hen. 3. c. 6.

(c) Tit. 32. c. 1.

(d) *Ante*, c. 1. s. 71.

(e) *Fleta*. Lib. I. c. 10. 1 Inst. 106. a. 107. a. Dyer, 285. b.

having been discontinued during the civil wars in the reign of King Charles I. and in the time of the Commonwealth, were entirely removed at the Restoration, by the statute 12 Cha. 2. c. 24. which enacted that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king, or others, be totally taken away; that all fines for alienations, tenures by homage, knight service and escuage, and also aids for marrying the daughter, or knighting the son, and all tenures of the king *in capite*, be likewise taken away; that all sorts of tenures held of the king or others, be turned into free and common socage, save only tenures in frankalmoigne, copyholds, and the honorary services of grand serjeanty; and that all tenures which should be created by the king, his heirs or successors in future, should be in free and common socage.



## CHAP. III.

## MODERN ENGLISH TENURES.

SECT. 1. *Manors.*8. *Courts Baron.*14. *Inferior Manors.*17. *How Manors are destroyed.*23. *Tenure in Socage.*26. *By Petit Serjeanty.*28. *In Burgage.*30. *In Ancient Demesne.*SECT. 38. *In Gavelkind.*39. *Incidents to these Tenures.*48. *Charges in Socage by stat.*  
12 Cha. II.52. *Tenure in Villenage.*53. *Copyholds.*59. *Free Copyholds.*62. *Tenure in Frankalmoigne.*

[THIS chapter, as is apparent from the titles of its several sections, can be of very little use to an American lawyer, and it is therefore omitted. We have already seen<sup>1</sup> that all the lands in the American colonies were held in free and common socage; a term importing tenure by any certain and defined service, duty, or render, not military.<sup>2</sup> The value of this tenure consisted, in modern times at least, in the certainty with which the services were defined, thus exempting the tenant from the wanton and arbitrary exactions to which other tenures were liable; and hence the care taken by the early adventurers in the settlement of this country, to secure the explicit declaration of this tenure in their charters. No oath of fealty seems ever to have been taken or required here; nor has any feudal solemnity been used, in the conveyance of lands, except livery of seisin. The only feudal fictions, and services, observes Chancellor Kent, which can be presumed to be retained in any part of the United States, consist of the feudal principle, that the lands are held of some superior or lord, to whom the obligation of fealty, and to pay a determinate rent are due. But the right to require the oath of feudal fealty was never practically applied, nor

<sup>1</sup> Ante, ch. 2. § 2. note 1.<sup>2</sup> Litt. § 117. 118.

assumed to apply to any other superior lord than the chief lord of the fee, or, in other words, to the people of the State; and then it resolved itself into the oath of allegiance, which is demandable of every citizen, on a proper occasion.<sup>1</sup>]

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<sup>1</sup> 3 Kent, Comm. 510, 512.

## TITLE I.

## ESTATE IN FEE SIMPLE.

## BOOKS OF REFERENCE UNDER THIS TITLE.

LITTLETON'S Tenures; with the ancient Commentary published by Mr. Carey.  
COKE upon Littleton.

BRACTON, Book I. II.

BLACKSTONE'S COMMENTARIES, Book II. ch. 7.

RICHARD PRESTON. Elementary Treatise on Estates, ch. 1, 2, 4, 7, 8.

Sir ROBERT CHAMBERS. Treatise on Estates and Tenures.

OWEN FLINTOFF. On the Law of Real Property. Vol. II. Book I. ch. 3.

KENT'S COMMENTARIES. Lect. 51, 52, 54.

STORY ON THE CONSTITUTION OF THE UNITED STATES. Book I.

SULLIVAN'S History of Land Titles in Massachusetts, p. 1—64.

KILTY'S Landholder's Assistant.

McHENRY'S Ejectment Law of Maryland.

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| <p>SECT. 1. <i>Of Real Property.</i><br/>         2. <i>Corporeal or Land.</i><br/>         3. <i>Shares in Corporate Stocks.</i><br/>         4. <i>Money to be laid out in Land.</i><br/>         5. <i>Heir Looms and Charters.</i><br/>         7. <i>Fixtures.</i><br/>         9. <i>Trees and Crops.</i><br/>         10. <i>Incorporeal.</i><br/>         11. <i>Estates in Land.</i><br/>         13. <i>Estates of Freehold.</i><br/>         22. <i>Of Seisin.</i><br/>         23. <i>Where an Entry is necessary.</i><br/>         30. <i>Abatement.</i><br/>         32. <i>Disseisin.</i><br/>         35. <i>Abeyance of the Freehold.</i><br/>         38. <i>Who may have Freehold Estates.</i><br/>         42. <i>Estates in Fee Simple.</i><br/>         46. <i>Abeyance of the Fee.</i></p> | <p>SECT. 48. <i>All other Estates merge in the Fee.</i><br/>         51. <i>Incidents to Estates in Fee Simple.</i><br/>         52. <i>Alienable.</i> *<br/>         54. <i>Descendible to Heirs General.</i><br/>         55. <i>Subject to Curtesy and Dower.</i><br/>         56. <i>Liable to Debts.</i><br/>         59. <i>Of Crown Debts.</i><br/>         62. <i>How Contracted.</i><br/>         63. <i>Bind the Lands when contracted.</i><br/>         65. <i>Into whose Hands soever they pass.</i><br/>         66. <i>How discharged.</i><br/>         67. <i>Estates in Fee forfeited for Treason.</i><br/>         70. <i>And for Disclaimer.</i><br/>         71. <i>Qualified Fees.</i></p> |
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SECTION 1. By the common law, property is divided into two kinds ; namely, Real and Personal Property, which are governed by distinct systems of jurisprudence. *Real property* consists of

land, and of all rights and profits arising from and annexed to land, that are of a permanent and immovable nature, and is usually comprehended under the words, lands, tenements, and hereditaments.<sup>1</sup> *Land* means the whole surface of the earth;<sup>2</sup> *tenement* is a word of still greater extent, signifying every thing that may be holden by a tenure: but *hereditament* is the largest and most comprehensive word, including not only lands and tenements, but whatever may be inherited. (a)

2. Real property is corporeal or incorporeal. *Corporeal* property consists wholly of substantial and permanent subjects, all which may be comprehended under the general denomination of \*land; which Lord Coke says, in its legal signification, comprehends any ground, soil, or earth whatsoever; as meadows, pastures, woods, waters, marshes, furzes, and heath. It has also in its legal signification an indefinite extent, upwards as well as downwards; for it is a maxim of law that *cujus est solum, ejus est usque ad cælum*.<sup>3</sup> Therefore

(a) 1 Inst. 6. a. (Sacket v. Wheaton, 17 Pick. 105.)

<sup>1</sup> Real estate, as described by Lord Coke, is that which "concerns, or is annexed to, or exercisable within lands." Co. Lit. 19, 20; 2 Ves. 663, 664. The words "*land*," and "*real estate*," have been defined by legislative acts, in several of the United States, and the meaning extended to include *lands, tenements, and hereditaments*, and all rights thereto and interests therein, wherever a more restricted meaning is not manifestly intended. See Revised Stat. Mass. ch. 2, § 6, art. 10; Rev. Stat. Maine, ch. 1, § 3, X.; Rev. Stat. New Hamp. ch. 1, § 17; Rev. Stat. Mich. Part 1, tit. 1, ch. 1, § 3, art. 9. In other States, the term "*real estate*" is simply declared coextensive with "*lands, tenements, and hereditaments*." Rev. Stat. Ind. ch. 28, § 228; Rev. Stat. Arkansas, ch. 31, § 7; and see Rev. Stat. N. York, 1828, Vol. I. p. 750, § 10; and some extend it expressly to chattels real. Rev. Stat. Missouri, ch. 32, § 49. Such has been declared the meaning so far as relates to the Registry Act of New York, except as to leases for a term not exceeding three years. Rev. Stat. N. York, 1828, Vol. I. p. 762, § 36. See also Rev. Stat. N. York, 1846, Vol. II. p. 5, § 25; Rev. Stat. Arkansas, ch. 49, § 19, where, in certain cases, equitable estates are also included.

[<sup>2</sup> The term '*land*' legally includes all houses and buildings standing thereon. Whatever is affixed to the realty is thereby made parcel thereof, and belongs to the owner of the soil. Sudbury v. Jones, 8 Cush. 189.]

<sup>3</sup> If a tree grows so near the confines of the land of two adjoining proprietors, that the roots extend into and the limbs overhang the adjoining close, yet the property in the tree belongs to the owner of the land in which the tree was planted. The proprietor of the adjoining close may remove the branches which overhang his land; but he may not convert them, nor the fruit, to his own use. Holden v. Coates, 1 M. & Malk. 112; Masters v. Pollie, 2 Roll. R. 141; Lyman v. Hale, 11 Conn. R. 177; Beardslee v. French, 7 Conn. R. 125. But *quære*, whether he may remove branches, after they have overhung his land twenty years. A projection, overhanging the land by

land legally includes all castles, houses, and other buildings standing thereon; and downwards whatever is in a direct line between the surface and the centre of the earth; such as mines of metals, coals, and all other fossils, which belong to the owner of the surface, except mines of gold and silver, for these by the royal prerogative belong to the crown.<sup>1</sup> (a)

(a) 1 Inst. 4. a. Idem. Plowd. 318.

right, is an incumbrance, and will justify the purchaser in repudiating a contract for the sale of an unincumbered title to the land. *Pope v. Garland*, 2 Y. & Col. 403.

<sup>1</sup> This branch of prerogative is confined to mines of gold and silver, and to those which are exclusively such. It was formerly held by a majority of the judges in England, in the case of *Mines*, Plowd. 310, that if the mine was of baser metal, with an intermixture of gold or silver, this intermixture, however small, entitled the king to the whole. But this opinion was strongly controverted at the time, Plowd. 337—340, and is not mentioned by Lord Coke, when treating of this subject, in 2 Inst. 578; see also 1 Bl. Comm. 294; and the law was declared otherwise by stat. 1 W. & M. st. 1, ch. 30, and 5 W. & M. ch. 6. The reasons on which this prerogative is founded are, that the king is bound to defend the realm, and to coin and furnish the currency required for this purpose, and for the uses of trade and commerce; to do which, the right to the mines of gold and silver is indispensably necessary. Plowd. 315, 316.

These reasons would seem to apply to the United States, as well as to any other sovereign power.

But in most of the Royal Charters, under which this country was settled, the *grant* of the soil expressly includes "all mines," as well as every other thing included or borne in or upon it; reserving as rent only, in the *reddendum*, one-fifth part of all the gold and silver ore, to be delivered at the pit's mouth, free of charge. Such were the charters of Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, and Virginia. In the charter of North Carolina one-fourth was thus reserved; and in that of Massachusetts one-fifth of the precious stones is also included. By the charter of Charles II. to the Duke of York, March 12, 1663, of the territory extending from Nova Scotia to Delaware Bay, all mines were expressly granted without any reservation: and therefore none is expressly found in the States of New York, New Jersey, nor Delaware. New Hampshire was simply organized as a Royal Province, by commission from the king. And as it was conceded and declared, in the case of the *Mines*, Plowd. 336, that a mine royal may by the king's grant be severed from the crown and granted to a private person, it results that upon the separation of these States from Great Britain, the former did not succeed to the prerogative right to gold and silver mines, in those States where such mines were included in the terms of the charters. Whether the States could demand the fifth or fourth parts reserved as rent, as the assignees of the crown in law, or by force of the treaty of peace; and whether the United States may claim the same proportion as the assignees of the States, under the Constitution, or the whole, by their own prerogative, on the original grounds above stated, are questions which it is not necessary here to discuss. In *Canatoo's case*, 3 Kent, Comm. 378. n., Mr. Justice Clayton said that the right of the State was a right of preëmption only, and that it was never considered greater by the government of Great Britain.

The State of New York, at an early period, asserted its sovereign right to all

(3. Shares in the property of a *corporation* are real or personal property, according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, &c., to make a canal, erect waterworks, and the

mines of gold and silver; giving permission to the discoverers of such mines to work them for twenty-one years only, and no longer, without permission of the legislature; and extending the claim to all such mines containing also copper, iron, tin or lead, where the latter ores do not amount to two-thirds of the whole. Stat. Feb. 6, 1789, Sess. 12, ch. 18. By the Revised Statutes of 1828, Part 1, ch. 9, tit. 11, the same right is distinctly reasserted, and extended to all mines of other metals found in lands owned by persons not citizens of any of the United States. See 3 Kent, Comm. 377, note b.

Where the owner in fee sold and conveyed the lands to another, reserving to himself and his heirs and assigns all manner of mines, &c., it was held that, under this reservation, he was not entitled to take all the minerals, but only so much as he could get, after leaving a reasonable support to the surface. *Harris v. Ryding*, 5 M. & W. 60; [*Smart v. Morton*, 30 Eng. Law & Eq. 385.]. If the mine thus reserved, or otherwise granted, is encroached upon, the remedy of the proprietor is in trespass, and not case, though he has no property in the soil above the mine; for he was in lawful possession of the mine. *Harker v. Birkbeck*, 3 Burr. 1556, 1 W. Bl. 482. A grant of a whole mineral stratum under the soil of the grantor, is a grant of a real hereditament in fee simple. *Stoughton v. Lee*, 1 Taunt. 402. And see *Grubb v. Guilford*, 4 Watts, 223. A license to enter the lands of the grantor, and mine and search for and raise metals, carry them away, and convert them to the grantee's own use, is not a mere personal license, but is also a grant of an interest in the property, and as such is capable of being assigned over. *Muskett v. Hill*, 5 Bing. N. C. 694. In trover, for copper ore raised from under the plaintiff's soil, it was held that the presumption that the right to the minerals accompanied the fee simple, might be rebutted by proof of the absence of enjoyment on the part of the plaintiff, and of user by persons not the owners of the soil. *Rowe v. Grenfel*, Ry. & M. 396.

In a lease of mines, or a contract for the sale of minerals to be raised therefrom by the vendee, where the vendor or proprietor has an interest either in the manner of working the mine, or in the quantity raised therefrom, the instrument carries *in gremio*, by implication, the right of entry and inspection of the mines and of the minerals raised. *Blakesley v. Whieldon*, 1 Hare, 176.

A mining concern, created by a lease to several persons, who jointly work it, with a community of expense and profit, is to some purposes a trading and partnership concern; and is therefore subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership, before the private creditors of an insolvent partner can come in. *Fereday v. Wightwick*, 1 Tamlyn, R. 250; 1 Rus. & My. 45. See also *Tredwin v. Bourne*, 6 M. & W. 461.

In a reservation of "*all minerals*," in a grant of land, it seems that the word is to be taken in its popular signification. *Gibson v. Tyson*, 5 Watts, 34. If a license to dig minerals does not clearly, in its terms, give the grantee the exclusive right, the grantor or his assigns may still exercise it in common with him. *Chetham v. Williamson*, 4 East, 469; *E. of Huntington v. Lord Mountjoy*, 4 Leon. 147.

like, as was the case of the New River water, the navigation of the River Avon and some others, and the property or interest in the land, though it be an incorporeal hereditament, is *vested inalienably in the corporators themselves*, the shares are deemed real estate.<sup>1</sup> Such, in some of the United States, has been considered the nature of shares in toll-bridge, canal and turnpike corporations, by the common law ;<sup>2</sup> though latterly it has been thought that railway shares were more properly to be regarded as personal estate.<sup>3</sup> But where the property originally entrusted is money, to be made profitable to the contributors by applying it to certain purposes, in the course of which it may be invested in lands or in personal property, and changed at pleasure, the capital fund is vested in the corporation, and the shares in the stock are deemed personal property, and as such are in all respects treated.<sup>4</sup> In modern practice, however, shares in corporate stock, of whatever nature, are usually declared by statute to be personal estate.)

4. *Money agreed or directed to be laid out in the purchase of land* is considered in equity as land ; because there, whatever is agreed to be done is considered as actually done. Where money directed to be laid out in the purchase of land comes into the hands of the person who would have had the absolute property of the land, in case a purchase had been made, it will be considered as money. But where it is in the hands of a third person, some act must be done by the person entitled to it, to show that he considers it as money, otherwise it will still be deemed land. (a)

5. There are some chattels which are considered as so annexed, and necessary to the enjoyment of the inheritance, that they are deemed in law to be a part of it, and descendible to the

(a) Fonb. B. 1. c. 6. s. 9. *Walker v. Denne*, 2 Ves. Jun. 170. *Biddulph v. Biddulph*, 12 Ves. 161.

<sup>1</sup> *Drybutter v. Bartholomew*, 2 P. W. 127; *Townsend v. Ash*, 3 Atk. 336; *Buckridge v. Ingraham*, 2 Ves. 652.

<sup>2</sup> *Wells v. Cowles*, 2 Conn. R. 567; *Price v. Price*, 6 Dana, 107; *Hurst v. Meason*, 4 Watts, 341, 346; *Binney's case*, 2 Bland, 145, 146. But in *Massachusetts*, from an early period, and upon great consideration, shares in all these corporations have been held to be personal estate ; the corporator having only a personal action for his dividends. *Russell v. Temple*, 3 Dane, Abr. 108, § 2—6.

<sup>3</sup> *Bradley v. Holdsworth*, 3 M. & W. 422, per Parke, B., and Alderson, B.

<sup>4</sup> *Bligh v. Brent*, 2 Y. & C. Exch. R. 268, 294, 295; *Bradley v. Holdsworth*, 3 M. & W. 422.

heir, from whence they are called *heir looms*. Thus, deer in a real authorized park, fishes in a pond, rabbits in a warren, and doves in a dove-house, are held to be part of the inheritance; and belong to the heir, not to the executor. (a)

6. It is the same of *charters*, court rolls, deeds and other evidences of the land, together with the chests and boxes in which they are contained. And where an ancient horn had immemorially gone with the estate, and had been delivered to the plaintiff's ancestors, to hold their land by it, it was decreed that it should go with the land as an heir loom. (b)

(7. In regard to *chattels*, as pertaining to the *realty by construction*, the principle upon which they are so treated is, that they have become *identified* with the realty. Therefore it is a rule, that things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, having been fixed to the realty, or used with it, and continuing to be so used, become parts of the land, *accessione et destinatione*, and pass with it by the deed of conveyance. Thus, in the conveyance of a cotton or woollen factory, by that or any other general name which is understood to embrace all its essential parts, the machinery is included, whether affixed to the building or not. So, in the conveyance of a saw-mill, *eo nomine*, the mill-chain, bars, &c., are included, as essential parts of the mill.<sup>1</sup> And so it is with regard to the engines, utensils, and instruments, whether fixed or loose, prepared *perpetui usus gratiâ*, and employed in the working of a mine.<sup>2</sup> So of the keys and bells of a house, the kettles, vats, fire-frames, furnaces, and grates set therein, pictures and mirrors set in the wainscot, the stones of a mill, and the like.<sup>3</sup> And it makes no difference that they are for the time being removed from the premises, if it

(a) 2 Comm. 427.

(b) 1 Rep. 1. Plowd. 323. *Pusey v. Pusey*, 1 Vern. 273.

<sup>1</sup> *Farrar v. Stackpole*, 6 Greenl. 154; *Fisher v. Dixon*, 12 Cl. & Fin. 312; 3 Dane's Abr. 156, § 39; 2 Com. Dig. tit. Biens, B.; *Powell v. Monson*, 3 Mason, R. 459; Gibbon on Fixtures, p. 27—31.

<sup>2</sup> *Fisher v. Dixon*, 12 Cl. & Fin. 312.

<sup>3</sup> *Liford's case*, 11 Co. 46, 50; Co. Lit. 4; *Cave v. Cave*, 2 Vern. 508; *Buckland v. Butterfield*, 2 Brod. & Bing. 54; *Union Bank v. Emerson*, 15 Mass. 159; *Goddard v. Chase*, 7 Mass. 432; *Gaffield v. Hapgood*, 17 Pick. 192; *Noble v. Bosworth*, 19 Pick. 314; *Colegrave v. Dias Santos*, 2 B. & C. 76; *Lyde v. Russell*, 1 B. & Ad. 394; *Washburn v. Sproat*, 16 Mass. 449; *Goddard v. Bolster*, 6 Greenl. 427; *Waterhouse v. Gibson*, 4 Greenl. 230; 6 Am. Law Mag. 346—362.



be for a temporary purpose, as for repairs; for they are still deemed parts of the realty.<sup>1)</sup>

(8. But an *exception* to this rule is admitted, where the parties, previous to the annexation of things to the freehold, have mutually *agreed* that they shall not become parts of the realty, but shall remain the property of the person annexing them, or may be removed by him. And a general usage may be shown in proof of such agreement.<sup>2)</sup>

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<sup>1</sup> Liford's case, 11 Co. 50; Wystowe's case, 14 H. 8, 25; Farrar v. Stackpole, 6 Greenl. 154. In *Rhode Island*, the main wheel, steam engine, boilers and shafts attached to real estate for the purpose of operating machinery, and all kettles set and used in a manufactory, when they belong to the owner of the soil, are declared by statute to be real estate, and the other implements of manufacture are deemed personal. Rev. Stat. Rhode Island, 1844, p. 261.

<sup>2</sup> Russell v. Richards, 1 Fairf. 429; 2 Fairf. 371; Hilborne v. Brown, 3 Fairf. 162; Osgood v. Howard, 6 Greenl. 452; Wells v. Banister, 4 Mass. 514; Colegrave v. Dias Santos, 2 B. & C. 76, per Best, J.; Hare v. Horton, 5 B. & Ad. 715; Heermance v. Vernoy, 6 Johns. 6; Aldrich v. Parsons, 6 N. Hamp. 555; Ashmun v. Williams, 8 Pick. 402. Buildings erected on the land of another, without his consent, become part of the realty; and if erected by the husband on his wife's land, they become hers, she being incapable of contracting with him. Washburn v. Sproat, 16 Mass. 449; Pierce v. Goddard, 22 Pick. 559. A partition fence, though not precisely on the line, goes to the grantee, unless it be otherwise agreed. Ropps v. Barker, 4 Pick. 239. [A house built and occupied by a reversioner, with the assent of the tenant for life, is not personal, but real, estate. Cooper v. Adams, 6 Cush. 87. "Whatever is affixed to the realty is thereby made parcel thereof, and belongs to the owner of the soil. *Quicquid plantatur solo, solo cedit*. Things personal in their nature, but prepared and intended to be used with real estate, having been fixed to the realty and used with it, become part of the land by accession, pass with it, and belong to the owner of the land. 1 Cruise's Dig. (Greenl. ed.) Gibbons on Fixtures, 2. It follows that where there is no agreement to change the legal rights of the parties, materials when used for building a house become part of the freehold, and cannot be reclaimed by their original owner after annexation to the realty, as against the owner of the land to which they have been affixed. Buildings erected on land of another, voluntarily and without any contract with the owner, become part of the real estate, and belong to the owner of the soil. 16 Mass. 449; 22 Pick. 559; Leland v. Gassett, 17 Verm. 403. An exception is admitted to this general rule where there is an agreement, express or implied, between the owner of the real estate and the proprietor of materials and buildings, that when annexed to the realty, they shall not become parts of it, but shall still remain the property of the person annexing them. In such case, the law gives effect to the agreement of the parties, and personal property, though affixed to the realty, retains its original characteristics, and belongs to its original owner. Within this exception are included not only cases where there is an express agreement between the parties that personal property shall not become real estate by annexation to the soil, but also that large class of cases which arise between landlord and tenant, in which by agreement, either express or implied, from usage or otherwise, the tenant is allowed to retain as his own property, if seasonably removed, fixtures erected by him for purposes of trade, ornament, or ordinary use, upon leasehold premises

(9. The question whether *trees and growing crops* are real or personal property, which arises most frequently in the application of the statute of frauds, depends mainly on the intention of the parties. It is well settled that a contract for the sale of *crops of the earth, ripe*, but not yet gathered, is not a contract for any interest in lands, and so not within the statute of frauds, though the vendee is to enter and gather them. Subsequently it has been held, that a contract for the sale of a *growing crop*, for example a crop of potatoes, is essentially the same, whether they are covered with earth in a field, or stored in a box; in either case the thing sold is but a personal chattel, and so is not within the statute of frauds. The later cases confirm the doctrine involved in this decision, namely, that the transaction takes its character of realty or personalty, from the principal subject-matter of the contract, and the intent of the parties; and that therefore a sale of any growing produce of the earth, reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land. In regard to things produced annually, by the labor of man, the question is sometimes solved by reference to the law of emblements; on the ground, that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land. But the case seems also to be covered by a broader principle of distinction, namely, between contracts, conferring an exclusive right to the land for a time, for the purpose of *making a profit of the growing surface*, and contracts for things annexed to the freehold, in prospect of their immediate separation; from which it seems to result, that where timber or other produce of

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during his tenancy." *Sudbury v. Jones*, 8 Cush. 189, 190. See also 6 Cush. 58, 87; *Trull v. Fuller*, 28 Maine, 545; *Corliss v. McLagin*, 29 Ib. 115; *Providence Gas Co. v. Thurber*, 2 R. I. 15; *Curtiss v. Hoyt*, 19 Conn. 154; *Farrar v. Chauffetete*, 5 Denio, 527; *King v. Wilcomb*, 17 Barb. Sup. Ct. 263; *Vanderpoel v. Van Allen*, 10 Ib. 157; *Dubois v. Kelly*, Ib. 496; *Buckley v. Buckley*, 11 Ib. 43; *Godard v. Gould*, 14 Ib. 662; *Lawrence v. Kemp*, 1 Duer, 363; *Heaton v. Findlay*, 12 Penn. State R. (2 Jones) 304; *Harlan v. Harlan*, 15 Ib. (3 Harris) 507; *Rice v. Adams*, 4 Harring. 332; *McKim v. Mason*, 3 Md. Ch. Decis. 186; *Wentz v. Fincher*, 12 Ired. 297; *Finney v. Watkins*, 13 Miss. 291; *Tcaff v. Hewitt*, 1 Ohio State R. 511; *Mason v. Fenn*, 13 Ill. 525; *Cope v. Romeyn*, 4 McLean, 384; *Regina v. Halsam*, 6 Eng. Law & Eq. 321; *Wiltshier v. Cottrell*, 18 Ib. 142; *Parsons v. Copeland*, 38 Maine, 537; *Doak v. Wiswell*, Ib. 569; *Baker v. Davis*, 19 N. H. (10 Foster) 325; *Gardner v. Finley*, 19 Barb. 317; *Roberts v. Dauphin Dep. Bank*, 19 Penn. (7 Harris,) 71.]

the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still, in the contemplation of the parties, evidently and substantially a sale of goods only, and so is not within the statute.<sup>1</sup>)

10. *Incorporeal property* consists of rights and profits arising from or annexed to land; such as advowsons and rents, which are held to be of a real nature. Even offices exercisable within \* certain places, though not annexed to land, are \* 47 said to savor of the realty; and dignities or titles of honor, having been originally annexed to land, are also considered as real property.<sup>2</sup> (a)

(a) (Allen v. McKean, 1 Sumn. 301.)

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<sup>1</sup> Greenl. on Evid. § 271, and cases there cited. The case of growing crops has been regulated by statute, in several of the United States. Thus, in *Mississippi*, they cannot be levied upon. Stat. 1840, ch. 5. § 9. In *Michigan*, they are liable to levy, but not to sale under execution, until ripe or severed from the ground; the levy creating a lien until thirty days after maturity or severance of the crop. Stat. 1840, ch. 124. In *Tennessee*, no growing crop can be levied upon, until the 15th of November next after it is matured; unless the owner has absconded. Stat. 1833, ch. 20. And see *Rutledge v. Walton*, 4 Yerg. 458. In *Alabama*, there can be no levy until the crop is gathered. *Toulmin's Dig.* tit. 24. ch. 16. p. 319. In *Kentucky*, the courts formerly held that even an unripe crop might be seized and sold on execution; contrary to decisions in other States. See *Penhallow v. Dwight*, 7 Mass. 34; *Stewart v. Doughty*, 9 Johns. 108. But by stat. 1834, LL. Ken. Vol. I. p. 657, no-growing crop is now liable to be taken and sold on execution, until it is severed from the land; except crops of corn, left standing after the first day of October. [Growing fruit trees and fences enclosing a field are fixtures, and as such belong to the freehold. *Mitchell v. Billingsley*, 17 Ala. 391. For decisions, whether or not growing crops pass with the land, see *Gillett v. Balcom*, 6 Barb. Sup. Ct. 370; *Bear v. Bitzer*, 16 Penn. State R. (4 Harris) 175; *Pitts v. Hendrix*, 6 Geo. 452; *Pickins v. Reed*, 1 Swan, Tenn. 80; *Gibbons v. Dillingham*, 5 Eng. (Ark.) 9; *Jones v. Thomas*, 8 Blackf. 428; Post, § 45, note, p. \* 55.]

<sup>2</sup> A corporate right to select and acquire land, for the purposes of the charter; such, for example, as a canal or a railroad, is held to be an incorporeal hereditament. *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Railroad Co.*, 4 Gill. & Johns. 1. So, of a permanent right to flow lands. *Harris v. Miller*, 1 Meigs, 158; a ferry right, *Bowman v. Wathen*, 2 McLean, 176; *Bridges v. Purcell*, 1 Dev. & Bat. 192; and a land-warrant, issued by the State of *Tennessee*, which, by law, goes to the heir. *Dunlap v. Gibbs*, 4 Yerg. 94.

A right to a pew in a church, by the common law, is an incorporeal hereditament, being only a right to occupy it during divine service. In England, the freehold of the church is in the parson for the time being. In the United States, the title generally depends on statutes, enacted by the several States, to regulate this description of property. In some of them, as, *Maine*, *Michigan*, *Connecticut*, *Massachusetts*, (except the

11. An *estate in land* means such an interest as the tenant hath therein. It is called in Latin *status*, because it signifies the condition or circumstance in which the owner stands with regard to his property. To ascertain this with precision and accuracy, estates in land may be considered in a threefold view:—1. With regard to the quantity of interest which the tenant has in his tenement. 2. With regard to the time at which that quantity of interest is to be enjoyed. 3. With regard to the number and connection of the tenants. (a)

12. *First*, with regard to the *quantity of interest* which the tenant has in his tenement. This is measured by its duration and extent; and occasions the primary division of estates into such as are freehold, and such as are less than freehold.

13. An *estate of freehold* is an interest in lands, or other real property, held by a free tenure, for the life of the tenant, or that of some other person, or for some uncertain period. It is called *liberum tenementum*, frank tenement or freehold; and was formerly described to be such an estate as could only be created by livery of seisin, a ceremony similar to the investiture of the feudal

(a) 1 Inst. 345. a. 2 Black. Comm. 103. Plowd. 555.

city of Boston,) pews are expressly declared to be real estate.<sup>1</sup> In others, as, *New Hampshire*, (and in Boston,) they are declared to be personal estate. It follows that, in the absence of any statute provisions, this kind of property is to be considered as real estate, in all cases arising under the statutes of frauds, or of conveyances, or of descents and distributions. The right of the pew-holder is subject to that of the proprietors, or trustees, or parish, in whomsoever the general title is vested, to repair, alter, remove, abandon, or rebuild the edifice, for the purpose of more convenient worship, and when it is necessary for that purpose. But if such alteration is not necessary, but is made solely for reasons of expediency or pleasure, the pew-holder is entitled to be indemnified for the loss of his pew. And while the house remains, the pew-holder may maintain ejectment, case, or trespass, according to the circumstances, if he be disturbed in his right. See 3 Kent, Comm. 402, and cases there cited; *Bates v. Sparrell*, 10 Mass. 323; *Sargent v. Peirce*, 2 Met. 80; *Fassett v. Boylston*, 19 Pick. 361; *North Bridgewater v. Waring*, 24 Pick. 304; *Freligh v. Platt*, 5 Cow. R. 494; *Heeney v. St. Peter's Ch.* 2 Edw. N. Y. Chan. R. 608; *Shaw v. Beveridge*, 3 Hill, N. Y. R. 26. By the common law of England, the right to a pew in a church can exist only by a faculty granted, or by prescription; and faculties are not granted, at the present day, unless under special circumstances, they being in derogation of the common right to free seats in the church; and if granted without the condition of residence in the parish, they are void. *Morgan v. Curtis*, 3 M. & R. 389; *Fuller v. Lane*, 2 Add. R. 427, 428; *Woolcombe v. Ouldrige*, 3 Add. R. 1; *Pettman v. Bridger*, 1 Phill. 316, 323—325. The law of England in regard to this species of property is fully discussed in the *Law Magazine*, Vol. II. p. 1—29.

<sup>1</sup> [Pews in all houses of public worship in Massachusetts are now made personal property. Acts 1855, ch. 122.]

law. But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient. (a)

14. There are *two qualities* essentially requisite to the existence of a freehold estate:—1. *Immobility*, that is, the subject-matter must either be land, or some interest issuing out of or annexed to land. 2. A sufficient legal *indeterminate duration*; for if the utmost period of time to which an estate can last is fixed and determined, it is not an estate of freehold. (b)

15. Thus if lands are conveyed to a man and his heirs for ever, or for the term of his natural life, or for the term of another's life, or until he is married, or goes to Rome, he has an estate of freehold; but if lands are limited to a man for five hundred years, or for ninety-nine years, if he shall so long live, he has not an estate of freehold. And the law was precisely the \* same when Bracton wrote. *Et sciendum quod liberum tenementum est id quod quis tenet sibi et hæredibus suis, in feodo, et hæreditate, vel in feodo tantum, sibi et hæredibus suis. Item ut liberum tenementum, sicut ad vitam tantam, vel eodem modo ad tempus indeterminatum, absque aliquâ certâ temporis præfinitione; sc. Donec quid fiat vel non fiat: ut si dicatur, Do tali donec ei providero. Liberum autem tenementum non potest dici alicujus quod quis tenet ad certum numerum annorum, mensium, vel dierum; licet ad terminum centum annorum, quæ excedit vitas hominum.* (c) \*48

16. It has been shown that, upon the introduction of the feudal law, all the lands in England became holden either by a free or a base tenure. The tenant who held by a free tenure had always a right to the enjoyment of the land for his life at least, and could not be dispossessed, even for the non-payment of his rent, or the non-performance of his services; whereas the tenant who held in villenage might be turned out at the pleasure of his lord; and his possession being perfectly precarious, was considered to be the possession of his lord, to whom he was in a great degree a mere slave. (d)

17. The person thus holding land by a free tenure was, there-

(a) Britton, c. 32. 1 Inst. 48. a.

(b) 2 Bl. Comm. 386.

(c) 1 Inst. 42. a. Bract. 207. a.

(d) Dissert. c. 2. s. 5. (Ante, Tenures, ch. 2. s. 5.) Black. Law Tracts, 1. Cons. on Cop. 153, 154.

fore, called a freeholder, because he might maintain his possession against his lord, and for this reason *liberum tenementum* was opposed to villenage. Thus Bracton says,—*Item dicitur liberum tenementum ad differentiam ejus quod est villenagium, quia tenementorum aliud liberum, aliud villenagium*: for an estate of freehold once created could not cease without entry or claim. And the acquisition of an estate of this kind was attended with several valuable rights and privileges; the freeholder became a member of the county court, one of the *pares curiæ* in the court baron or lords' court, was entitled to be summoned on juries in the king's court, and to vote at the election of a knight of the shire. (a)

18. In subsequent times the word freehold was in some cases applied to the estate or interest only of the tenant; as where a person had an estate for life in lands held in villenage, he was said to have a freehold interest. Thus Lord Coke says:—"A freehold is taken in a double sense; either it is named a freehold in respect of the state of the law, and so copyholders may be freeholders; for any that hath an estate for his life, or any greater estate in any land whatsoever, may in this sense be termed  
49 \* a \* freeholder; or, in respect to the land, and so it is opposed to copyholders, that what land soever is not copyhold is freehold. (b)

19. It is, however, fully proved by Sir W. Blackstone, in his *Considerations on Copyholders*, that no person can be considered as a freeholder, or entitled to the privileges of a freeholder, unless his estate consists of free land. So that although the determination of an estate be uncertain, yet if it is held by a base tenure, it is not considered in law as a freehold; nor has the tenant any of those privileges which the law gives to freeholders; for in that case he has a freehold interest only, whereas no estate is, strictly speaking, freehold, unless the possessor holds it by a free tenure; therefore all freehold estates must now be held in socage.

20. Lord Coke says, a *freehold* estate may at several times be *moveable*, sometimes in one person, and *alternis vicibus* in another; as if there be eighty acres of meadow, which have been used, time out of mind, to be divided between certain persons, and that a certain number of acres appertain to every one of these persons, to be yearly assigned and allotted to them; they

(a) 207. a. 1 Inst. 218. a.

(b) Coke, Cop. s. 15.

have freehold estates in their respective portions of the meadow. (a)

21. A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another; and seeing it is an inheritance corporeal, it shall pass by livery.<sup>1</sup> (b)

22. The possession of a feud was called *seisin*, which denoted the completion of the investiture by which the tenant was admitted to the land. Upon the introduction of the feudal law into England, the word *seisin* was only applied to the possession of an *estate of freehold*; in contradistinction to that precarious kind of possession by which tenants in villenage held their lands, which was considered to be the possession of their lords, in whom the freehold continued. (c)

23. Where a freehold estate is conveyed to a person by feoffment, with livery of *seisin*, or by any of those conveyances which derive their effect from the statute of uses, he acquires a *seisin in deed*, and a *freehold in deed*. But where a freehold estate is devolved upon a person by act of law, as by descent, \* he only acquires a *seisin in law*, that is, a right to \* 50 the possession; and his estate is called a *freehold in law*; for he must make an *actual entry* on the land to acquire a *seisin*, and a *freehold in deed*.<sup>2</sup> (d)

24. The *entry* must be made by the person having right, or some one authorized by him;<sup>3</sup> for the mere act of going on the

(a) 1 Inst. 4. a. Welden v. Bridgewater, Cro. Eliz. 421.

(b) 1 Inst. 48. b.

(c) Dissert. c. 1. 1 Inst. 153. a. 266 b. 1 Burr. R. 107. 1 Inst. 200. b. Plowd. 503.

(d) 1 Inst. 266 b. See tit. 29. Descent, c. 3.

<sup>1</sup> In such case the two parts of the edifice are regarded as separate dwelling-houses. 9 E. 4, 38; 5 H. 7, 9; Bro. Abr. Demand, 20; Loring v. Bacon, 4 Mass. 575; Otis v. Smith, 9 Pick. 293; Proprietors, &c. v. Lowell, 1 Met. 538. Even a lease of a yard does not necessarily pass a cellar under the yard, in the occupation of another. Doe d. Freeland v. Burt, 1 T. R. 701. And see Winton v. Cornish, 5 Ohio R. 478.

<sup>2</sup> This has been altered by statute 3 & 4 W. 4, c. 106. In the United States, the doctrine most generally prevalent is, that no actual entry is necessary, either by an heir or a grantee, in order to give him a *seisin in deed*, provided the ancestor or grantor was seised at the time, or the possession was vacant, the ancestor or grantor having the right. Wells v. Prince, 4 Mass. 64; Green v. Chelsea, 24 Pick. 71; Jackson v. Howe, 14 Johns. 406; Stearns on Real Actions, p. 32, 83; Bates v. Norcross, 14 Pick. 224; Magoun v. Lapham, 21 Pick. 135; Green v. Litch, 8 Cranch, 229; Barr v. Gratz, 4 Wheat. 213, 221. See 4 Kent, Comm. 385—389, and *post*, tit. *Deed*.

<sup>3</sup> The authority may be by parol; and a general authority to take care of the property of the principal is sufficient for this purpose. And if the entry is made by a stranger, in the name and behalf of the owner, who afterwards adopts and ratifies the act,

land will not amount to a legal entry, sufficient to vest the actual seisin in the person who has the right; but, in order to constitute a legal entry, the person must enter with that intent, and do some act to show such intention.<sup>1</sup> (a)

25. The entry of the heir upon any part of the estate will give him a seisin in deed of all the lands lying in the same county; for, since the freehold in law was cast upon him by the death of his ancestor, and no person was in possession, so that no particular estate is to be defeated, a general entry into part is sufficient to reduce the whole into actual possession; but where lands lie in different counties, there must be an entry in each county.<sup>2</sup> (b)

26. If the heir is deterred from entering by bodily fear, he may make claim as near as he can. Such claim is, however, only in force for a year and a day; but if it is repeated once in the space of every year and a day,<sup>3</sup> which is called continual claim,† it has the same effect as a legal entry. (c)

(a) 1 Inst. 245. b. Plowd. 92. 6 Mod. 44.

(b) 1 Inst. 15. a. 252. b.

(c) 1 Inst. 250. a & b. 251.

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this also is sufficient. *Richards v. Folsom*, 2 Fairf. 70; *Stearns on Real Actions*, p. 45—46; *Tolman v. Emerson*, 4 Pick. 160. The maxim, *Omnis rati habitio retrotrahitur, et mandato æquiparatur*, was fully considered and expounded in *Bird v. Brown*, 14 Jur. 132; in which case the Court were of opinion, that to enable the party on whose behalf the act was done, or his agent, to take advantage of it in an action of tort, the ratification must take place at a time, and under circumstances when the ratifying party might himself lawfully have done the act which he ratifies. See 3 Law Rep. 121, 127, 128, N. S. *Podger's case*, 9 Rep. 106 a; *Ld. Audley's case*, Cro. El. 561; *Moore*, 457; *Poph. 108*, S. C. If the possession is vacant, or no one is upon the land at the time of entry, no declaration of intention by the agent is necessary. *Tolman v. Emerson*, *supra*. [When part of the heirs enter on lands that descend to them, their entry is presumed to be according to their legal title, and it enures to the benefit of all, so that all are seized unless those who enter claim adversely and oust the others. *Means et al. v. Welles et al.* 12 Met. 356.]

<sup>1</sup> If the act would have been lawful in a mere stranger, such as riding along a public way over the land, it is not sufficient. It must be such an act as, in a stranger, would be a trespass. *Robison v. Swett*, 3 Greenl. 316. See *Stearns on Real Actions*, p. 45; *Co. Lit.* 245, b; *Holly v. Brown*, 14 Conn. R. 255, 269, 270; *Altamas v. Campbell*, 9 Watts, 28.

<sup>2</sup> Feoffments were anciently made on the land, before the *pares curiæ*; and the entry of the feoffee was recorded in the records of the lord's court. Afterwards, when the attestation of the *pares curiæ* was not held necessary, that of the *pares comitatûs* was; and hence an entry in each county was still held necessary, because it was to be tried by the *pares comitatûs*. See *Stearns on Real Actions*, p. 3. *Gilbert on Tenures*, p. 39—40.

<sup>3</sup> This is understood to mean nothing more than a full year. *Co. Lit.* 250 b. note (1.)

[† This is now abolished. By Stat. 3 & 4 Will. 4, c. 27, s. 11, it is enacted that no



27. The entry of the heir is only necessary where the lands were in the actual occupation of the ancestor at the time of his death; for if the lands are held under a lease for years, and the lessee entered under the lease, the heir is considered as having seisin in deed, before entry or receipt of rent, because the possession of the lessee for years is his possession. † (a)

28. The possession of a guardian in socage is also the possession of the ward. So that if a widow having a son, on whom her husband's estate descends, continues in possession after her husband's death, the law considers her as guardian in socage to her son; and, therefore, admits the son, by that means, to have seisin in deed of the land. (b)

29. Where lands are let on leases for lives, the freehold is in the lessees, consequently the heir has no immediate right of entry \* on the death of his ancestor. He is, however, \* 51 entitled to the rent reserved on the lease, by the receipt of which he becomes seised of the rent, and also of the reversion expectant on the determination of the lease. (c)

30. The seisin in law, which the heir acquires on the death of his ancestor, may be defeated by the entry of a stranger, claiming a right to the land, which entry is called an *abatement*; and in such a case the only mode of regaining the seisin is by an entry of the legal owner, which will restore him to the possession.<sup>1</sup> If the abator dies seised, the lands will descend to his heir; and previously to the recent statute of limitations such descent tolled, or took away the entry‡ of the heir; who, in that case, was driven to his action. (d)

(a) 1 Inst. 15. a. 3 Wils. R. 521. 7 Term R. 390. 8 Term R. 213. Tit. 8. c. 1.

(b) *Goodtitle v. Newman*, 3 Wils. 516. Tit. 29. c. 3. § 65, 66.

(c) 1 Inst. 15. b.

(d) 1 Inst. 277. a. Lit. s. 385. *Vide* tit. 29. c. 1. Tit. 31. c. 2.

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continual or other claim upon or near any land shall preserve any right of making an entry or distress or bringing an action.]

[† See s. 35 of the above statute.]

[‡ The law is now altered by Stat. 3 & 4 Will. 4, c. 27, s. 39, which enacts, that no descent cast, discontinuance, or warranty, which may happen or be made after the 31st December, 1833, shall toll or defeat any right of entry or action for the recovery of land.]

<sup>1</sup> In several of the United States, it has been provided by statutes, that no descent shall take away the right of entry. See *Maine Rev. St.* ch. 145, § 8; *Massachusetts Rev. St.* ch. 101, § 5; 2 *Rev. St. N. York*, Part 3, ch. 4, tit. 2, § 15, p. 393, (3d ed.); *Indiana Rev. St.* ch. 45, § 7; *Arkansas Rev. St.* ch. 91, § 3. In *Massachusetts* and

31. Where a younger brother entered upon the death of his ancestor, such entry was not an abatement; for it should be intended that the younger brother did not set up a new title, but only entered to preserve the possession of the ancestor in the family, that no one else should abate. And if the younger son died in possession, still the elder son might enter; for the law would not intend the entry of the younger son to be a wrongful act, therefore his possession became that of the elder. †<sup>1</sup> (a)

32. Where a person is in the actual seisin of an estate of freehold, he may lose that seisin by a stranger's entering on the estate, and forcibly ousting or dispossessing him of it; which is called a *disseisin*, and is thus defined by Littleton, s. 279, "Disseisin is properly where a man entereth into lands or tenements, where his entry is not congeable, and ousteth him which hath the freehold." Lord Coke, in his comment on this passage, observes, that every entry is not a disseisin, unless there is an ouster of the freehold; and it is said by Mr. Justice Fortescue in 8 Geo. 1, that every disseisin is a trespass, but every trespass is not a disseisin. A disseisin is when one enters, intending to usurp the possession, and to oust another of the freehold.<sup>2</sup>

52 \* Therefore, *querendum est a iudice quo animo* he entered.

(a) Lit. s. 396. Gilb. Ten. 28.

*Maine*, this provision is extended to every discontinuance of estate, in whatever mode it may have been effected. In *Kentucky*, by Stat. 1798, Rev. St. Vol. I. p. 582, § 5, and in *Mississippi*, by Rev. St. ch. 91, § 3, the provisions of St. 32 Hen. 8, ch. 33, have been expressly reenacted, by which five years' peaceable possession by the disseisor, before descent cast, is made necessary, in order to oust the disseisee of his right of entry.

<sup>1</sup> The doctrine of *possessio fratris*, in the law of descents, is generally abrogated in the United States, (except in *Maryland*, and perhaps in *North Carolina*,) by force of the statutes of descents and distributions, which, either in express terms or by broad and general language, give to the heir, by direct descent, all the ancestor's rights to real property, without regard to the question whether or not he died actually seised. See 4 Kent, Comm. 388—389; 2 Peters, R. 625; 1 Rev. St. N. Car. ch. 38, § 1; 1 Dorsey's LL. Maryl. p. 745.

<sup>2</sup> A disseisor is defined by Mr. Preston to be "a person who acquires a seisin, without any title." 2 Preston on Abstracts of Title, p. 388.

[† By sect. 13 of the above act, it is enacted, that when a younger brother, or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.]

To make an entry a disseisin there must be an ouster of the freehold, either first by taking the profits, or secondly by claiming the inheritance.<sup>1</sup> (a)

33. There is scarcely a subject in the English law so obscure as that of disseisin. The full effect of disseisins must formerly have been not only a dispossessing of the freeholder, but also a substitution of the disseisor, as tenant to the lord; and as one of the *pares curie*, in the place of the disseisee. Now as the consent of the lord was formerly necessary to the admission of a new tenant into the feud, it is difficult to conceive how a complete disseisin could take place without the consent or connivance of the lord.

34. Lord Mansfield has, therefore, justly observed, that “the precise definition of what constituted a disseisin, which made the disseisor the tenant to the demandant’s *præcipe*, though the right owner’s entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded; for after the assize of novel disseisin † was introduced, the Legislature by many acts of Parliament, and the courts of law, by liberal constructions, in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property, if by bringing his assize he thought fit to admit himself disseised.”<sup>2</sup> (b)

(a) 8 Mod. 55.

(b) *Taylor v. Horde*, 1 Burr. R. 110.

[† The writ of a novel disseisin is abolished by Stat. 3 & 4 Will. 4, c. 27, s. 36, after the 1st of June, 1835.]

<sup>1</sup> The possession of the disseisor must be open, notorious, exclusive, and adverse to the title of the owner. *Taylor v. Horde*, 1 Burr. 110.

<sup>2</sup> In the United States, as in England, two kinds of disseisin are recognized; namely, a disseisin in spite of the owner, also termed a disseisin in fact; and a disseisin by the election of the owner, also termed a disseisin by construction of law. The effect of the former is to give the disseisor an absolute title in fee, against all the world, if he is suffered to remain in undisturbed possession of the land, during the time expressed in the statutes of limitation. The latter is created by acts without actual force, and in themselves equivocal, and not necessarily amounting to an entire and immediate ouster of the freehold, but which the owner may, if he pleases, treat as usurpations of his freehold, for the sake of vindicating his title by an action at law. Such is the case, where a tenant for life or years makes a feoffment; *Taylor v. Horde*, 1 Burr. 60; 3 Price, 598; *Miller v. Shackelford*, 3 Dana, R. 389; or where a tenant at will makes a lease for years; *Blunden v. Baugh*, Cro. Car. 302; or where a lease is made by a stranger,

35. Where there is no person *in esse* in whom the freehold is vested, it is said to be in *abeyance*, that is, in expectation, remembrance and contemplation of the law. But it is a principle

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and the lessee enters under it, without force. *Jerritt v. Weare*, 3 Price, 575. In these and the like cases, as the act of entry is equivocal, and may be either a trespass or a disseisin, according to the intent, the law will not permit the wrongdoer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it. *Prescott v. Nevers*, 4 Mason, R. 326—329. And see *Ricard v. Williams*, 7 Wheat. 60; *Robison v. Swett*, 3 Greenl. 316; *Allen v. Holton*, 20 Pick. 458, 467; *Rogers v. Joyce*, 4 Greenl. 93; *White v. Reid*, 2 Nott & M'Cord, 534. To constitute a disseisin of the former class, or in spite of the owner, the act must be an unequivocal act of ownership, open, known, exclusive, adverse, and uninterrupted. A disseisin of this kind may be made, not only by an actual and forcible turning the owner out of possession, but by entering under a conveyance from one who has no title; *Jackson v. Huntington*, 5 Peters, R. 402; by any entry under claim or color of title; *Ewing v. Burnett*, 11 Peters, R. 41; *Melvin v. Proprietors of Locks, &c.*, 5 Met. 15; [*Hoag v. Wallace*, 8 Foster (N. H.) 547; *Whitney v. French*, 25 Vt. 663; *Comins v. Comins*, 21 Conn. 413; *Thomas v. Kelly*, 13 Ired. 269; *Abercrombie v. Baldwin*, 15 Ala. 363; *Herbert v. Hanrick*, 16 Ala. 581; *House v. Palmer*, 9 Geo. 497; or under a parol gift, *Pope v. Henry*, 24 Vt. (1 Deane) 560; but see *Comins v. Comins*, 21 Conn. 413; *Clarke v. McClure*, 10 Gratt. (Va.) 305;] by occupying and cultivating it under claim of title; *Robinson v. Douglas*, 2 Aik. 364; though it be not a rightful title; *Warren v. Childs*, 11 Mass. 222; *Jackson v. Newton*, 18 Johns. 355; [*Wendell v. Moulton*, 6 Foster (N. H.) 41; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633;] such as, a defective levy; *Allen v. Thayer*, 17 Mass. 299; *Bigelow v. Jones*, 10 Pick. 161; or be merely a claim of an exclusive right to possess. *Allyn v. Mather*, 9 Conn. R. 114; see *Fowle v. Ayer*, 8 N. Hamp. 60, where disseisin is well described.

It must be adverse to the title of the true owner; that is, utterly inconsistent with his title, and with an express or tacit denial of it. *Little v. Libby*, 2 Greenl. 242; *French v. Pearce*, 8 Conn. R. 440; *Small v. Proctor*, 15 Mass. 495; [*Hoye v. Swan*, 5 Md. 237; *Armstrong v. Ristean*, Ib. 256; *Clarke v. McClure*, 10 Gratt. 305; and must consist of an occupancy of the lands in good faith, and under the belief that the claimant has a good title. *Woodward v. McReynolds*, 1 Chand. 244.] And the intent so to claim, in opposition to the title of any other, must be clear; for otherwise, it will be presumed to be in submission to the title of the true owner. *Smith v. Burtis*, 6 Johns. 197; *Jackson v. Sharp*, 9 Johns. 163; *Rung v. Shoneberger*, 2 Watts, 23; *Gwinn v. Jones*, 2 Gill & Johns. 173; *Lund v. Parker*, 3 N. Hamp. 49; [*Pierson v. Turner*, 2 Carter (Ind.) 123; *Lane v. Gould*, 10 Barb. Sup. Ct. 254.] The intent of the party in taking and holding possession, is a fact to be found by the jury. *Atherton v. Johnson*, 2 N. Hamp. 31; *Dennett v. Crocker*, 8 Greenl. 239; *Jenks v. Jay*, 9 Johns. 102; [*Beverly v. Burke*, 9 Geo. 440; *Herbert v. Hanrick*, 16 Ala. 581; *Woodward v. McReynolds*, 1 Chand. Wisc. 244.] His declarations, even though made to a stranger, are admissible in evidence in disparagement of his claim; but are not admissible in his own favor, to prove a disseisin against the owner, unless made to the owner. *West Cambridge v. Lexington*, 2 Pick. 536; *Church v. Burghardt*, 8 Pick. 327; *Little v. Libby*, 2 Greenl. 242; *Alden v. Gilmore*, 1 Shepl. 178; *Crane v. Marshall*, 4 Shepl. 27; *Carter v. Gregory*, 8 Pick. 168. [There can be no adverse possession against the Commonwealth; *Koiner v. Rankin*, 11 Gratt. (Va.) 420; in *Massachusetts*, see Rev. St. ch. 119,

of the highest antiquity that there should always be a known and particular owner of every freehold estate, so that it should never, if possible, be in abeyance. This rule was established for

§ 12; St. 1852, ch. 253. Adverse possession is not affected by a sale of the premises on execution against the owner. 7 Rich. S. C. 509.] Whether an occupancy by mistake, and through misapprehension of the dividing line, amounts to a disseisin, is a point not perfectly agreed. In *Maine* and in *Tennessee* it has been held no disseisin. *Brown v. Gay*, 3 Greenl. 126; *Ross v. Gould*, 5 Greenl. 204; [Lincoln v. Edgecomb, 31 Maine, 306;] *Gates v. Butler*, 3 Humphrey, R. 447. In *Connecticut* and in *Pennsylvania* it is held otherwise; *French v. Pearce*, 8 Conn. 440, 445, 446; *Jones v. Porter*, 3 Penn. R. 132; on the ground that, in order to be an adverse possession, it is sufficient that the party intended to claim the land as exclusively and absolutely his own estate, and actually and visibly occupied it as such, receiving the profits to his own use, without any supposed or assumed accountability; and that this may well be the case without any knowledge or suspicion of any other title or claim. *Melvin v. Proprietors of Locks, &c.*, 5 Met. 15, 33. See also *Parker v. Proprietors of Locks, &c.*, 3 Met. 100, 101; *Hale v. Glidden*, 10 N. Hamp. 397. In *Maine* also, if the grantor, by mistake, conveys a larger tract than he owns, and the grantee enters and actually occupies according to his deed, it is held that the grantee thereby disseises the true owner; though the rule, that occupation by mistake is no disseisin, is in such case applicable to the grantor. *Otis v. Moulton*, 2 Applet. 205. But to constitute a disseisin by the grantee, in such case of occupancy by mistake, the occupancy must be actual and visible; for his entry will not be extended by mere construction, beyond the limits of his title. *Enfield v. Day*, 7 N. Hamp. 457, 467; *Hale v. Glidden*, supra.

In general, if the tenant has a legal right to hold the possession, such as to flow the land, or to use a dock, he shall be conclusively presumed to hold under that title, and shall not be permitted to say that he holds by wrong, or against the general owner. *Tinkham v. Arnold*, 3 Greenl. 120; *Parker v. Proprietors of Locks, &c.*, 3 Met. 99. But if he takes exclusive possession of the land, against the will of the lessor, as, if he builds a wharf upon the dock, it is a disseisin. *Tyler v. Hammond*, 11 Pick. 193. So, if he remains in as tenant by sufferance, it is no disseisin. *Doe v. Hull*, 2 D. & R. 38. But if the disseisor demises the land, and his tenant holds over by sufferance after the death of the disseisor, this is a continuance of the disseisin. *Melvin v. Proprietors of Locks, &c.*, 5 Met. 15, 33. [So where a person enters on land owned by two as tenants in common, by license of one of them, and erects and occupies a building thereon, he is considered as holding in submission to their title until the contrary is shown. *Buckman v. Buckman*, 30 Maine, 17 Shep. 494; and where two have real estate set off to them jointly, the possession of one claiming the whole, is not adverse to that of the other. *Brooks v. Towle*, 14 N. H. 248. Possession under the deed of a married woman, the deed being void, is adverse to her title. *Matthews v. Puffer*, 19 N. H. (7 Foster) 448.] If a vendee enters under an agreement for the purchase, the money not being paid, his possession is no disseisin, it being in submission to the vendor's title, and by his consent; and if he afterwards buys up an adverse claim, this does not change the character of his possession and render it adverse. But if the purchase-money has been paid, and the vendee is entitled to a deed of conveyance, which the vendor has agreed to give, and consents to the entry of the vendee; his possession is thenceforth adverse, and a disseisin of the vendor. *Brown v. King*, 5 Met. 173; *Higginbottom v. Fishback*, 1 A. K. Marsh. 506; *Daniel v. Ellis*, Ibid. 60. And see *Winterbottom v. Ingham*, 10 Jur. 4; [Maltonner v. Dimmick, 4 Barb. Sup. Ct. 566;

two reasons:—1. That the superior lord might know on whom he was to call for the military services that were due for the feud; otherwise the defence of the realm would have been con-

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*Fosgate v. The Herkimer M. & H. Co.* 12 Ib. 352; *Stamper v. Griffin*, 12 Geo. 450; *Gray v. Hutchins*, 36 Maine, 142.]

The possession must also be open, visible, and exclusive, so that it may be known to the true owner. Therefore the running of lines round the land by a surveyor, and marking them; or the occasional cutting of the grass; *Kennebec Purchase v. Springer*, 4 Mass. 416; or the execution and delivery and registration of a deed of wild land, and a formal entry under it by the grantee, without an open and exclusive possession, manifested by fences or otherwise, are not sufficient to constitute an actual disseisin. *Bates v. Norcross*, 14 Pick. 224. Nor is the making of a fence on wild land, by felling trees in a line, lapping one upon another, sufficient for this purpose. *Coburn v. Hollis*, 3 Met. 125; 2 Greenl. on Evid. § 557, and cases there cited. [Acts of occupation of open and unenclosed woodland, by cutting wood and timber for use and for sale, the cutting off at one time of all the wood and timber standing on the premises, the clearing of a small portion for the purpose of cultivation, the sale of a part of the premises, the running of a line between the premises and other lands of the owner by documentary and record title, and the marking of the line run by lopping trees, although these acts were within the knowledge of the owner, were held not to dispossess the owner, there being no evidence showing the enclosure of the land by fences, the building upon it, or cultivating it. *Slater et al. v. Jepherson*, 6 Cush. 129.] If the occupancy is not necessarily, and in its nature adverse, it may become and be shown to be adverse by a declaration to that effect, made by the occupant to the true owner as above stated; but not if made to a stranger. Notice to the owner is conclusively presumed against him, where the acts done are of such a character as clearly to disclose the fact and the extent of the possessor's occupancy, and his exclusive exercise of dominion over the land, and appropriation of it to his own use. *Kennebec Purchase v. Laboree*, 2 Greenl. 275, 283, 284; *Kennebec Purchase v. Call*, 1 Mass. 483; 2 Greenl. on Evid. § 557, and cases there cited. What acts are sufficient to raise this presumption of notice, is a point that has been much disputed. It is, however, settled, that acts of notoriety, such as building a fence round the land, or erecting buildings upon it, are notice to all the world. *Poignard v. Smith*, 6 Pick. 172, 178. Yet the erection of a fence is not held indispensable to constitute an adverse possession; it is nothing more than an act presumptive of an intention to assert title; of which intention, many other acts are equally evincive; such as entering upon the land and making improvements, raising a crop of corn, felling and selling the trees thereon, and the like, under color of title. *Ellicott v. Pearl*, 10 Peters, R. 442; *Ewing v. Burnet*, 11 Peters, R. 52, 53. And neither actual occupation, cultivation nor residence are necessary to constitute actual possession, where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evinced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Ibid.* [*Wallace v. Maxwell*, 10 Ired. 110; *Lenoir v. South*, Ib. 237; *Wickliffe v. Ensor*, 9 B. M. 253; *Stephens v. Leach*, 19 Penn. (7 Harris) 262; see *Wood v. McGuire*, 15 Geo. 202.]

An entry into a tract of land, under a deed, describing the same by specific metes and bounds and duly registered, gives the party a constructive possession of the whole tract, if there be no actual adverse possession; and is a disseisin of all persons claim-

siderably weakened. 2. That every stranger, who claimed a right to any particular lands, might know against whom he ought to bring his *præcipe* for the recovery of them; as no real

ing title to the same land, to the extent of the boundaries mentioned in the deed. *Ellicott v. Pearl*, 10 Peters, R. 442; *Prescott v. Nevers*, 4 Mason, R. 326; [*Foxcroft v. Barnes*, 29 Maine (16 Shep.) 128; *Putnam Free School v. Fisher*, 34 Maine (4 Red.) 177; *Massengill v. Boyles*, 11 Humph. 112; *Furnley v. Chamberlain*, 15 Ill. 271;] *Warren v. Child*, 11 Mass. 222; *Kennebec Purchase v. Laboree*, 2 Greenl. 275; *McCall v. Neely*, 3 Watts, 69; *Miller v. Shaw*, 7 S. & R. 129; [nor for this purpose is it necessary that the deed under which he enters, be recorded. *Spaulding v. Warren*, 25 Vt. (2 Deane) 316. See also *Brown v. Edson*, 22 Vt. 357; *Chandler v. Spear*, 22 Vt. 388; and as well without written claim of title as with it. *Buck v. Squiers*, 23 Vt. (8 Washb.) 498; see *Lane v. Gould*, 10 Barb. Sup. Ct. 254;] and this, whether the title by the deed was valid, or defective and void. *Clarke v. Courtenay*, 5 Peters, R. 319; *Thomas v. Harrow*, 4 Bibb. 563. [Unless there is *actual* occupation of some portion of the premises by the grantee under a recorded deed, the real owner is not dis-seised thereby. *Putnam Free School v. Fisher*, 38 Maine (3 Heath) 324.] But if the true owner is at the same time in actual possession of part of the land, claiming title to the whole, then his seisin extends by construction over the whole tract; and he is dis-seised only to the extent of the actual, visible, and adverse possession of him who enters under such deed; *Ibid.*; *Hall v. Powell*, 4 S. & R. 456; *Gonzalus v. Hoover*, 6 S. & R. 118; *Green v. Liler*, 8 Cranch, 229, 230. [*Putnam Free School v. Fisher*, 34 Maine (4 Red.) 177.] And see *Brimmer v. Long Wharf*, 5 Pick. 131; *Riley v. Jameson*, 3 N. Hamp. 23; *Davidson v. Beatty*, 3 Har. & McHen. 594; *Higbee v. Rice*, 5 Mass. 345.

The possession, moreover, must be continued, without interruption or abandonment; for otherwise, it is no longer a disseisin, and the owner will be again seised. *Little v. Megquier*, 2 Greenl. 176; *Small v. Proctor*, 15 Mass. 495; *Jones v. Chiles*, 2 Dana, 25; *Ewing v. Burnet*, 11 Peters, R. 53. [*Winthrop v. Benson*, 31 Maine, 1 Red. 381; *Poor v. Horton*, 15 Barb. Sup. Ct. 85; *Cleveland v. Jones*, 3 Strobb. 479, note.]

In some of the United States, the possession, which shall constitute a disseisin, within the meaning of the statutes of limitation, and of betterments, so called, has been defined by positive law. Thus, in *Maine*, it is enacted that the possession shall be deemed sufficient, though the land "be not surrounded wholly by a fence, or rendered inaccessible by other obstructions, if such possession and improvement shall have been open, notorious, and exclusive, and comporting with the usual management and improvement of a farm by its owner, and though a portion of it be woodland and uncultivated." *Maine Rev. St. ch. 145, § 42*; 2 Greenl. 275. In *Michigan*, (Rev. St. Part 3, tit. 3, ch. 2, § 49,) the possession, to entitle the party to the value of his lasting improvements, must be "under circumstances affording a presumption of title." See also *Mississippi Rev. St. ch. 47, § 15*. In *New Jersey*, an actual and continued possession, under purchase from one in the actual occupancy of the land, and supposed to have a legal title thereto, is made sufficient to the extent of the description in the deed, against all prior grants and titles not followed by actual possession. *Elmer's Digest*, p. 314. In *New York*, an adverse possession, by one claiming title under some written instrument, or some judgment or decree, is deemed to exist in land which the party has usually cultivated or improved;—or has protected by a substantial enclosure;—or, though not enclosed, has used for the supply of fuel, or of fencing timber, for the purposes of husbandry or for the ordinary use of the occupant. And if a known farm or

\* 53 \* action could be brought against any person but the actual freeholder. (a)

36. In consequence of this doctrine, it is a rule that a freehold estate cannot [by any conveyance operating at common law] be created to commence *in futuro*, except by way of remainder; because in that case the freehold would be in abeyance, from the execution of the conveyance to the moment when the estate created was to commence. [But by executory devise and conveyances operating by virtue of the statute of uses, freehold estates may be limited so as to commence *in futuro*; and in such cases the freehold does not continue in abeyance; for until the estates so limited take effect, in the case of devise, it descends to the heir at law of the testator, and in that of a deed, results to or remains in the grantor.]<sup>1</sup> (b)

37. One of the few instances in which a freehold estate can be in abeyance is, where the parson of a church or other ecclesiastical person dies; for in that case the glebe, &c., is in abeyance, till a successor is appointed.<sup>2</sup> (c)

(a) 1 Inst. 342. b.

(b) 1 Inst. 217. a. 5 Rep. 94. b. 1 Lut. 795. 4 Taunt. 20. Fearn, Rem. 351.

(c) Lit. s. 647. (Hob. 338. 2 Roll. Abr. 502.)

single lot has been partly thus improved; the portion remaining uninclosed, according to the custom of the country, is deemed to have been sufficiently possessed, contemporaneously with the other. But where the occupant does not claim under any written instrument, judgment, or decree, his possession is not sufficient, unless the land has been either protected by a substantial enclosure—or usually cultivated or improved. Rev. St. N. York, 1846, Vol. II. p. 392, 393, § 10, 11, 12. See 2 Smith's Lead. Cas. 413—416, Wallace's note.

A disseisin of flats may be made by entering upon and filling them up, or by building a wharf and using the flats adjoining for laying vessels at the same, but the entering upon uninclosed flats, when covered by the tide, sailing over them for the ordinary purposes of navigation, or anchoring on them, does not constitute a disseisin. *Wheeler v. Stone*, 1 Cush. 313; *Drake v. Curtis*, Ib. 395. See also *Treat v. Chipman*, 35 Maine (5 Red.) 34. For cases touching the tacking together of the possessions of disseisors, see *Reed v. Locks and Canals*, 8 How. U. S. 274; *Chilton v. Wilson*, 9 Humph. 399; *Bullen v. Arnold*, 31 Maine, 583.]

<sup>1</sup> See *Buckler's case*, 2 Co. 55 a, and cases in 1 Hoffm. Course, p. 191. Post, Vol. IV. p. 71 [48] and Vol. VI. p. [377] note.

<sup>2</sup> See accordingly, *Terrett v. Taylor*, 9 Cranch, 47; *Pawlet v. Clark*, Ibid. 293; *Weston v. Hunt*, 2 Mass. 500; *Brunswick v. Dunning*, 7 Mass. 445; *Brown v. Porter*, 10 Mass. 93; *Cheever v. Pearson*, 16 Pick. 266. But if a grant for charitable uses is made to a person or corporation not *in esse*, the right or property granted remains in the grantor until the grantee comes into existence, and then it attaches to the grantee. *Shapleigh v. Pilsbury*, 1 Greenl. 271, 286 — 289; *Rice v. Osgood*, 9 Mass. 38; *Dart*.



38. All *natural persons* born within the dominions of the crown of England, are *capable of holding freehold estates*; unless they are attainted of treason or felony, or have incurred the penalties of a *præmunire*; for in those cases they are considered as civilly dead, and therefore incapable of possessing any real property.

39. *Aliens*, that is, persons born out of the dominions of the crown of England, except the children and grandchildren of natural born subjects, are incapable of holding freehold estates for their own benefit; unless they are naturalized by act of parliament, or made denizens by the king's letters-patent.<sup>1</sup> (a)

(a) 1 Inst. 2 b. Tit. 29. c. 2.

mouth College v. Woodward, 4 Wheat. 691. See Mr. Hoffman's note on Abeyance, 1 Hoffm. Course, 243.

<sup>1</sup> Aliens are expressly made capable of taking, holding, and transmitting lands, without residence, or other condition, in the States of *Ohio*, *Michigan* and *Illinois*. (See *Ohio* Rev. St. 1841, ch. 3; *Michigan* Rev. St. 1837-8, p. 266, § 26; *Illinois* Rev. St. 1833, p. 626, § 38,) [and in *Massachusetts*, St. 1852, ch. 29.] In other States, they are habilitated upon conditions, or with modifications. Thus, residence in the State is required in *New Hampshire*, (Rev. St. ch. 129, § 4,) and in *Missouri*, (Rev. St. 1845, ch. 6.) Residence and the oath of allegiance are required, by the Constitutions of *Vermont*, (§ 39,) and of *North Carolina*, (§ 40,) and by a statute of *South Carolina*, (Stat. 1799, 1 Brevard, Dig. 236;) *Vaux v. Nesbit*, 1 McCord, Ch. R. 362. In *New Jersey*, it is required that he be an alien friend at the time of taking. (Elmer's Dig. p. 6, Stat. March 13, 1845.) So it is in *Pennsylvania*; but his right to hold by purchase, and transmit to heirs, is restricted to 5,000 acres; (Stat. March 24, 1818, Purdon's Dig. p. 57;) though the right to take and hold by descent, which is given by an earlier statute, is without restriction. (Stat. Feb. 23, 1791, Purdon's Dig. 56.) A previous declaration of intention to become a naturalized citizen, pursuant to the statutes of the United States, is required by the laws of *Connecticut*, *Maine*, *Delaware*, *Maryland*, *Virginia*, *Tennessee*, *Arkansas*, *Indiana*, *Missouri*. In *Connecticut*, a residence of one year in the State is also a prerequisite; (Stat. 1845, ch. 3;) but a special capacity may be granted by Chancery, after a residence of six months. (Rev. St. 1838, tit. 36.) In *Delaware*, (Rev. St. 1829, p. 33, 202,) and in *Tennessee*, (Stat. 1839, ch. 35, § 1,) and in *Indiana*, (Rev. St. 1843, p. 414,) residence in the State is required, but without any definite time. In *Missouri*, (Rev. St. 1845, ch. 6,) it is sufficient if the party is resident in the United States. In *Arkansas*, (Rev. St. 1837, ch. 7, § 1,) residence in the State is required, in order to take by purchase; but residence elsewhere in the United States is sufficient, in order to transmit by descent. In *Maine*, (Rev. St. ch. 91, § 2; ch. 93, § 5, 6, 7;) *Maryland*, (Stat. 1814, ch. 79, 1 Dorsey's ed. 625;) and *Virginia*, (Stat. 1813, ch. 25, Tate's Dig. p. 24,) the title is not complete unless the party's naturalization is subsequently completed. But in *Maine*, his heirs may take by descent, if the ancestor dies before the time for being naturalized has arrived. In *New York*, an alien resident *any where within the United States*, is enabled to take and hold, in fee, and to sell, assign, mortgage, and devise real estate, but not to lease or demise the same, provided he shall have made oath,

40. *Bodies corporate*, whether sole or aggregate, ecclesiastical or lay, may hold those freehold estates that have been transmitted to them by their predecessors. They are, however, prohibited by several ancient and modern laws, usually called the statutes of mortmain, from purchasing more lands, without a license from the crown. But the power of suspending statutes by legal authority only, being declared illegal at the Revolution, it was deemed prudent to give a parliamentary sanction to licenses in mortmain. This was done by the Statute 7 & 8 Wm. 3, c. 37, by which it was enacted that it should be lawful for the king, his heirs and successors, to grant to any person or persons, bodies politic or corporate, their heirs and successors, licenses to  
 \* 54 \* alien in mortmain, and also to purchase, acquire, take, and hold in mortmain, in perpetuity or otherwise, any

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before any officer authorized to take proof of deeds, that he is a resident of, and intends always to reside in, the United States, and to become a citizen thereof as soon as he can be naturalized; and that he has taken the incipient measures required by law for that purpose; which deposition must be filed in the office of the Secretary of State. This power to alien and convey is to continue for six years after making and filing such deposition. But no *such* alien can take or hold lands descended, devised, or conveyed to him previous to his having become a resident of the United States, and having made the above-mentioned deposition. And if he dies within the six years, his estate being inhabitants of the United States, may take by descent as though they were citizens. N. Y. Rev. Stat. 1846, Vol. II. p. 4. § 16, 17, 18, 19. And by a subsequent statute, any alien *resident in the State of New York*, on making and filing the oath above mentioned, is rendered fully capable of taking, holding, and conveying real estate, as a citizen. Ibid. p. 5, 6, § 26—37. And see 2 Kent, Comm. 69, 79. *Post*, tit. 32, ch. 2, § 32. Tit. 29, ch. 2, § 12.] Under these statutes, the widow of an alien grantee is considered as a purchaser, and therefore is entitled to dower. *Sutliff v. Forgey*, 1 Cowen, 89; 5 Cowen, 713; *Priest v. Cummings*, 16 Wend. 617.

An alien, not otherwise entitled to hold land, acquires no life-estate in the land of his wife, by marriage; and a levy thereon, as the estate of the husband, gives no title to the creditor or to the purchaser at a sheriff's sale. *Mussey v. Pierre*, 11 Shepl. 559.

[The right of aliens to hold real estate in Vermont was considered in *State v. Boston, C. & M. R. R. Co.* 25 Vt. 433. In the New York statute regulating descents, the alienism of the ancestor embraces collaterals as well as lineals. *McCarthy v. Marsh*, 1 Selden, 263. For other decisions respecting the rights of aliens to take and transmit lands, see *Brown v. Sprague*, 5 Denio, 545; *Leefe's case*, 4 Edw. ch. 395; *Redpath v. Rich*, 3 Sandf. Sup. Ct. 79; *Beck v. McGillis*, 9 Barb. Sup. Ct. 35; *Duke of Cumberland v. Graves*, Ib. 595; S. C. 3 Selden, 305; *Atkins v. Kron*, 5 Ired. Eq. 207; *Copeland v. Sands*, 1 Jones's Law, 70; *McCaw v. Galbraith*, 7 Rich. S. C. 74; *Ford v. Husman*, Ib. 165; *Keenan v. Keenan*, Ib. 345; 18 Ala. 565; 1 Tex. 673; 3 Ib. 349; 5 Ib. 211; *Starks v. Traynor*, 11 Humph. 292; *State v. Beackmo*, 8 Blackf. 246; *Ex parte Smith*, Ib. 395; *Huddleston v. Lazenby*, 1 Smith, 203; S. C. 1 Carter, 234; *Greenia v. Greenia*, 14 Mis. 526.]

lands, tenements, rents, or hereditaments whatsoever. [So that although the capacity to purchase is at common law incident to lay corporations, yet it seems to be now settled that they must have a license from the crown before they can exert that capacity to purchase.<sup>1</sup> And having this capacity to take, it would seem that corporations, being absolutely entitled, have an incident power of alienation.] (a)

41. It was formerly the practice, before a license of mortmain was granted, to sue out a writ of *quod damnum*, in order to ascertain whether such a license would be prejudicial to the king or others. But Mr. Hargrave says he was well informed that writs of this kind had not been usual on granting mortmain licenses since the Statute 7 & 8 Wm. 3. (b)

42. Estates of freehold are either estates of inheritance, or not of inheritance. The former are again divided into inheritances absolute, or fee simple; and inheritances limited; one species of which is called fee tail.

“*Tenant in fee simple* (says Littleton, s. 1,) is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin *feodum simplex*; for *feodum* is the same that

(a) Tit. 32. c. 2. 1 Inst. 99. a. n. 1. Tit. 32. c. 2. Co. Lit. 2. b. Com. Dig. tit. Franchise F. 15. 17. 1 Bl. Com. 479. Com. Dig. Ib. F. (18.) Sid. 162. Plow. 538.

(b) 1 Inst. 99. a. n. 1.

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<sup>1</sup> In *Pennsylvania*, all lands conveyed to a corporation, or to another for its use or in trust for its benefit, without the license of the commonwealth, are forfeited to the commonwealth, as in the case of an escheat for want of heirs. Stat. Apr. 6, 1833, § 1. But the title of the corporation, whether foreign or domestic, is valid until office found. *Runyan v. Coster*, 14 Peters, R. 122. In the other States, it is understood that the English statutes of mortmain have not been reenacted or practised upon; and the inference from the statutes creating corporations, and authorizing them to hold real estate to a limited extent, is, that such corporation cannot hold real estate for any purposes foreign to those of their institution. 2 Kent, Comm. 283; *Jackson v. Hartwell*, 8 Johns. 422; *Sutton v. Cole*, 3 Pick. 232. But for purposes not foreign to their institution, corporations created by statute, may hold any property within the limits of value prescribed by statute. All other lay corporations not thus restricted, have, as incident to their existence, the power to purchase and hold lands at their discretion. Angell & Ames on Corporations, ch. 5; *Phillips Academy v. King*, 12 Mass. 546; *Vidal v. Girard's Exrs.*, 2 How. S. C. R. 127. And it seems that a corporation created in one State may hold lands in another, if within the limits of the powers granted to it by the laws of its own State. 2 Kent, Comm. 283; *Runyan v. Coster*, 14 Peters, R. 122; *Lathrop v. The Bank of Scioto*, 8 Dana, 114. And see *Bank of Augusta v. Earle*, 13 Peters, R. 584.

inheritance is, and *simplex* is as much as to say lawful or pure; and so *feodum simplex* signifies a lawful or pure inheritance.

43. Littleton has been censured for annexing an improper meaning to the word *feodum* in his definition; and it has been contended that the word signifies land holden of a superior lord by military or other services. But although this was certainly the original meaning of the word, yet when the feudal law was fully established here, and it was universally acknowledged that all the lands in England were held mediately or immediately of the crown, the word *feodum*, or fee, became generally used to denote the quantity of estate or interest in the land. Thus it appears from Bracton, that the word *feodum* was then often used in both these senses. *Et sciendum quod feodum est id quod quis tenet, ex quacunque causâ, sibi et hæredibus suis. Item dicitur feodum alio modo ejus qui alium feoffat, et quod quis tenet ab alio: ut si sit qui dicat, Talis tenet de me tot feodo per servitium militare.* And it is evidently for the purpose of denoting the quantity of interest, that the word *feodum* is used in pleading an inheritance in the king, viz., *Rex seisitus fuit in dominico suo ut de feodo*; where the word *feodum* cannot possibly import  
55\* an estate holden, \*the king not holding of any superior lord, but merely denotes an inheritance. (a)

44. An estate in fee simple is the entire and absolute interest and property in the land; from which it follows that no one can have a greater estate. So that whenever a person grants an estate in fee simple, he cannot make any farther disposition of it, because he has already granted away the whole interest; consequently nothing remains in him. An estate in fee simple may, however, be granted on condition; and in devises by will, and deeds deriving their effect from the statute of uses, an estate in fee simple may be rendered defeasible on the happening of some future event.

45. Tenant in fee simple is the absolute master of all houses and other buildings erected on the land, as also of all timber growing thereon, for trees are considered as parcel of the inheritance; and the law does not favor the severance of them from the freehold, because they would be thereby wasted and destroyed.<sup>1</sup>

(a) Wright, 149. 263. b.

<sup>1</sup> Though all that grows on the soil, whether spontaneously or by culture, ordinarily

He is also entitled to all mines of metal, except gold and silver; and to dig up, and dispose of all minerals and fossils which are under the land. (a)

46. We have seen that the law requires the freehold should never, if possible, be in abeyance; but where there is a tenant of the freehold, the *remainder or reversion* in fee simple may exist for a time without any particular owner, in which case it is said to be *in abeyance*. Thus, if an estate be limited to A for life, remainder to the right heirs of B, the fee simple is in abeyance † during the life of B, because it is a maxim of law that *nemo est hæres viventis*. (b)

47. The law, however, does not favor the abeyance of the fee simple, for in that case many operations are suspended. (1.) The particular tenant or person in possession of the freehold is rendered dispunishable, at law, for waste; for a writ of waste can only be brought by one entitled to the fee simple. (2.) The

(a) *Ante*, s. 2. *Lyddall v. Weston*, 2 Atk. 19.

(b) 1 Inst. 342. b.

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passes with the land, yet trees, grass, crops, and other things fixed to the soil, and so part of the realty, may be the subject of a separate sale, in prospect of severance, and in that case will be regarded as personal chattels, if so treated by the parties. The cases on this much vexed subject are extremely contradictory; but the principle now most generally recognized seems to be this, that in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have a right to the soil for a time, for the purpose of farther growth and profit of that which is the subject of sale, it is an interest in land, within the meaning of the fourth section of the statute of frauds, and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only, and so not within that section of the statute; although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land. The question thus turning upon the intention of the parties, and the nature of the contract, it would seem to be of no importance whether the thing sold is to be severed from the soil by the vendor or the vendee; whether it is to be paid for by particular admeasurement, or in the gross; or whether the subject of sale consists of trees, and other spontaneous products, or of *fructus industriales*. See 1 Greenl. on Evid. § 271, 4th ed. and the cases in the notes. See also *Evans v. Roberts*, 5 B. & C. 829, 837, 840; *Jones v. Flint*, 10 Ad. & El. 753; *Bostwick v. Leach*, 3 Day, R. 476, 484; *Claffin v. Carpenter*, 4 Met. 584; *Austin v. Sawyer*, 9 Cowen, 39; *Smith v. Surman*, 9 B. & C. 561; *Stukeley v. Butler*, Hob. 173; *Wood v. Hewett*, 10 Jur. 390; 15 Law Journ. 247; *Mant v. Collins*, Ib. 248. [*Mauldin v. Amistead*, 14 Ala. 702; *Northen v. The State*, 1 Carter, (Ind.) 113. *Ante*, § 9, note, p. \* 46.]

[† That is, the contingent remainder in fee is in expectation, as Lord Coke expresses it, but the reversion in fee is not in abeyance but results to the grantor until the contingency.]

title, if attacked, could not formerly be completely defended; for there was no person in being whom the tenant of the freehold could pray in aid to support his right. (3.) Nor could the mere right itself, if subsisting in a stranger, be recovered in this interval; for in a writ of right patent, a tenant for life could not  
 56 \* join the mise on \* the mere right. (4.) And in modern times the courts do not favor the abeyance of the fee simple, because it operates as a restraint on alienation. (a)

48. All inferior estates and interests in land are derived out of the fee simple; therefore, whenever a particular estate, or limited interest in land, vests in the person who has the fee simple of the same land, such particular estate or limited interest becomes immediately drowned or merged in it,<sup>1</sup> upon the principle that *omne majus continet in se minus*.† (b)

49. Where a sum of money is charged upon a real estate, which estate comes to the person entitled to the money, if in fee, the charge is merged; and where the money is secured by a term for years, or other legal estate, in a third person, there the charge is also merged, except where creditors are concerned; or where the person becoming entitled to the charge is an infant, and dies during his minority, having by will disposed of the charge. (c)

50. A term of five hundred years was vested in trustees to secure a daughter's portion, payable at eighteen, or marriage. The fee simple of the estate descended to the daughter, who afterwards died an infant, about eighteen; having made a nuncupative will, which was good as to personal estate, whereby she devised all in her power to her mother. It was decreed by Lord Somers that this portion was not merged, but should go to the mother. And the decree was affirmed by the House of Lords. (d)

(a) Tit. 2. c. 2.

(b) (*Webster v. Gilman*, 1 Story, R. 499; *Roberts v. Jackson*, 1 Wend. 478.)

(c) 2 P. Wms. 604. *Donisthorpe v. Porter*, 2 Eden, 162. Vid. tit. 39, Merger, *infra*.

(d) *Thomas v. Kerneys*, 2 Vern. 348. *Colles' Cases in Parliament*, 112. *Powell v. Morgan*, 2 Vern. 90. *Chester v. Willes*, Amb. 246. *Donisthorpe v. Porter*, 2 Ed. 162.

<sup>1</sup> See tit. Estate for Years, ch. 2. Also, tit. Merger, Vol. VI. tit. 39.

[† There is one exception to this rule in the case of estates tail. *Vide infra*, tit. 2, c. 1: also in the instance of a base fee vesting in the person seised of the immediate reversion in fee; for by the 39th section of the Statute 3 & 4 Will. 4, c. 74, it is enacted that the base fee shall not merge but be enlarged to as large an estate as the tenant in tail could acquire by any disposition under the act.]

51. The law has annexed to every estate and interest in lands, tenements, and hereditaments, certain peculiar incidents, rights, and privileges, which in general are so inseparably attached to those estates, that they cannot be restrained by any proviso or condition whatever.

52. Of the several *incidents inseparably annexed* to an estate in fee simple, the first is a *power of alienation*. Any general restriction, therefore, of this power, annexed to the creation of an estate in fee simple, is absolutely void, and of no effect. (a)

53. This unlimited power of alienation comprises in itself all inferior powers; so that a tenant in fee simple may create any \* inferior estate or interest out of his own. There- \* 57 fore a custom that a tenant in fee simple cannot demise his lands for more than six years is void, because it is contrary to the freedom of the estate of one who hath a fee simple. [If the tenant in fee simple does not alienate his estate during his life, he has the absolute power of testamentary disposition by a will duly executed according to the solemnities required by statute. (b)]

54. If the tenant in fee simple dies intestate, the] estate will *descend to the heirs general* of the person who was last seised thereof, whether male or female, lineal, or collateral. And it is for this reason that the word simple is added to the word fee, importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs; in contradistinction to another class of estates of inheritance, which are only descendible to some particular heirs, of which an account will be given in the next title. (c)

55. Estates in fee simple are *subject to the curtesy* of the husband and the *dower* of the wife, which will be noticed under those respective titles.

56. [Estates of which a person died seised in fee simple, and which descended upon the heir, were at common law liable in the hands of the heir to the payment of all debts of the ancestor by specialty, (in which the heir was expressly mentioned as bound,) but if he aliened before the action was brought the creditor was without remedy; and where the person so dying

(a) *Doe v. Pearson*, tit. 38. c. 9.

(b) *Salford's case*, *Dyer*, 357. b. Tit. 38. c. 5. s. 1.

(c) Tit. 29. c. 3.

seised, was indebted by bond or other speciality, and devised the estate, the creditor had no remedy against the devisee.]† (a)

(a) *Davye v. Pepys*, Plowd. 439. *Buckley v. Nightingale*, 1 Stra. 665.

[† The statute of 3 & 4 Will. and Mary, c. 14, made perpetual by the 6 & 7 Will. 3, c. 14, gave the creditor "by bond or other speciality" a remedy against the heir and devisee jointly, and if the heir aliened before action brought, he was liable to the amount of the value of the land; but the lands *bonâ fide* aliened by the heir before action brought, were not liable to the debts.

By the above act no remedy was given to the creditor against the devisee alone, if there were no heir; and it was held that the act only applied to specialties on which an action of *debt* lies, such as bond debts or covenants for the payment of sums certain, but not for damages for breaches of covenants or contracts under seal. *Wilson v. Knubley*, 7 East, 128.

58 \* The late act of 11 Geo. 4, and 1 Will. 4, c. 47, repeals the \* above acts, and remedies the defects before mentioned, operating upon the wills made or to be made of all persons in being at the passing of the act, and upon all wills thereafter to be made by any person whomsoever. The act (section 2) makes devises of real estate void as against the specialty creditors by bond, covenant, or otherwise; and by section 3 gives them a remedy by actions of debt or covenant against the heir and devisee, or the devisee of such first named devisee; and (section 4) if there be no heir then against the devisee; section 6 makes the heir liable to the amount of the value of the lands if he alien before action brought. But lands *bonâ fide* aliened before such action are not liable to the debts in the hands of the purchaser; section 8 gives similar remedies against the devisee if he alien before action brought.

The 5th section protects from the operation of the act limitations and devises of real estate for the payment of debts, or portions for children in pursuance of marriage contracts *bonâ fide* made before marriage, and is nearly a reenactment of the 3 Will. and Mary, c. 14, s. 4. *Gott v. Atkinson*, Willes, 521; *Millar v. Horton*, Cooper, 45; *Hughes v. Doulben*, 2 Bro. C. C. 614; *Bailey v. Ekins*, 7 Ves. 319.

Until the recent statute 3 & 4 Will. 4, c. 104, estates in fee simple were not in general liable to the payment of simple contract debts; a doctrine not very consonant to natural justice. By the statute 1 & 2 Will. 4, c. 56, s. 22, 25, 26, in part repealing the 6 Geo. 4, c. 16, when a person is declared a bankrupt, full power is given to the assignees (in whom the real and personal estate vests by operation of the act) to dispose of all his lands. The statute 3 & 4 Will. 4, c. 74, s. 55, 56, empowers the commissioners to dispose of the bankrupt's estates tail to a purchaser, and in part repeals the 6 Geo. 4, and 1 & 2 Will. 4, c. 56. *Vide infra*, tit. 2, c. 2, s. 40—44.

Formerly, where a trader died before he was declared a bankrupt, his real estate was not liable to his simple contract debts. But by the statute 1 Will. 4, c. 47, s. 9, repealing 47 Geo. 3, sess. 2, c. 74, it is enacted, "that when any person, being at the time of his death a trader within the bankrupt laws, shall die seised of, or entitled to, any real estate, which he shall not by his last will have charged with the payment of his debts,

and which would have been assets for the payment of his debts due on any specialty, in which the heirs were bound; the \* same shall be assets, to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; provided that all creditors by specialty shall be paid the full amount of their debts before any creditors by simple contract, or by specialty, in which the heirs are not bound, shall be paid any part of their demands."



57. The personal estate is, however, the first and immediate fund for the payment of debts; and though a person charge his real estate, by his will, with the payment of his debts, yet that does not exempt the personal estate from being first applied for that purpose, unless the testator expressly exonerate it.<sup>1</sup> (a)

\* 58. Even a testamentary disposition of all the per- \* 60  
sonal estate will not exempt it from being applied in payment of debts. For a court of equity will suppose the intention of the testator to have been, that only the residue of his

(a) *Ancaster v. Mayer*, 1 Bro. C. C. 454. *Burton v. Knowlton*, 3 Ves. Jr. 107. *Brummell v. Prothero*, 1b. 111. *Morrow v. Bush*, 1 Cox's R. 185. *Bootle v. Blundell*, 1 Mer. 193. 19 Ves. 494.

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And now by the recent statute 3 & 4 Will. 4, c. 104, freehold and copyhold estates in all cases are made assets for the payment of simple contract as well as specialty debts. By that statute it is enacted that after the passing of the act, (29th August, 1833,) when any person shall die seised of, or entitled to, any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir at law, customary heir, or devisee of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir at law or devisee of any person who died seised of freehold estates was before the passing of the act liable to, in respect of such freehold estates at the suit of creditors by specialty, in which the heirs were bound: And it is provided that in the administration of assets by courts of equity, under the act, all creditors by specialty in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty in which the heirs are not bound, shall be paid any part of their demands. See as to the limitation of actions for debts of specialty, &c., statute 3 & 4 Will. 4, c. 42, s. 3.]

[<sup>1</sup> Where a testator gives several legacies and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with legacies, for in such a case the 'residue' can only mean what remains after satisfying the previous gifts. *Hill on Trustees*, 508. Such is the settled law both in England and in the United States, though cases do not often occur for its application. Where one does occur, a legatee may sue to recover the legacy without distinguishing in his will the estate into the two kinds of realty and personalty, because it is the manifest intention of the testator that both should be charged with the payment of the money legacies. Nor does this conflict at all with the principle of equity jurisprudence declaring that generally the personal estate of the testator is the first fund for the payment of debts and legacies. The rule has its exceptions, and this is one of them. *Lewis v. Darling*, 16 How. U. S. 1, 10. An estate in fee, defeasible upon a contingency, is liable to be taken in execution by a creditor of the tenant, and held until the happening of the contingency. *Phillips v. Rogers*, 12 Met. 405.]

personal estate, after payment of debts, should go to the legatees, unless a contrary intention evidently appears.<sup>1</sup> (a)

59. By the common law the king was entitled to have execution of the body, goods and *lands* of his debtor, by virtue of his royal prerogative. By the eighth chapter of *Magna Charta* it was declared that the king's bailiffs should not seize any lands or rent for debt, as long as the goods and chattels of the debtor sufficed. *Nos vero nec ballivi nostri non seisiemus terram aliquam vel redditum, pro debito aliquo, quamdiu catalla debitoris præsentia sufficiunt, et ipse debitor paratus sit satisfacere.* And Lord Coke observes that this was an act of grace, restraining the power which the king had before. (b)

60. If the goods and chattels are not sufficient, his *real estates* become liable to the payment of all the *debts due to the crown*; for, where the debt is of record, or by specialty, the process is by writ of extent, returnable in the Court of Exchequer; by which the sheriff is directed to inquire, by the oaths of lawful men, what lands and tenements the debtor had at the time of the debt contracted. And if the debt arises on simple contract, the practice of the exchequer is, on affidavit of the debt, to direct a commission to inquire of it; and on inquisition returned, the debt is recorded, and an extent issues. (c)

(a) *Stephenson v. Heathcote*, 1 Edn, 38.

(b) 2 Inst. 19. Dyer, 67. b. *Attorney-General v. Resby*, Hard. R. 378.

(c) 2 Inst. 19. *Rorke v. Dayzell*, 4 Term R. 408.

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<sup>1</sup> In the United States, the rule is, that lands are liable for the debts of the owner, whether due by matter of record, by specialty, or by simple contract. Upon his death, they descend to the heir, or go to the devisee, subject to the payment of the debts of the ancestor, according to the laws of the State in which they are situated. *Watkins v. Holman*, 16 Peters, R. 25, 62, 63. The heir or devisee has no right, except that of possession, until the creditors shall be paid. The ordinary mode of reaching the lands of a deceased debtor, is through the executor or administrator, who is empowered by the proper court, on deficiency of the personal assets, to sell so much of the real estate as may be necessary to discharge the remaining debts. And in several of the States, the lands may also be taken on an execution against the executor. In most of the States, the personal estate of a deceased person is the primary fund for the payment of his debts; and the assets are marshalled in equity as follows:—1. The general personal estate; 2. Real estate specially charged by will with the payment of debts; 3. Real estate not devised; 4. Real estate devised. 4 Kent, Comm. 420, 421; 1 Story on Eq. Jurisp. § 551—577; *Hays v. Jackson*, 6 Mass. 149. But the methods of carrying out the above-mentioned doctrine, in the settlement of estates, are greatly diversified by the statutes of the several States, to which alone, with the decisions upon them, resort can safely be had. See 4 Kent, Comm. 420—422.

[As to the mode in which the lands of a debtor may be taken on execution, see *post*, tit. XIV., § 97, note, page \*63.]

61. Where the king's debtor dies, the crown may, notwithstanding, seize his lands and goods. It is said by Fanshawe, remembrancer of the queen, that, after the death of any debtor to the crown, process shall issue against the executor, the heir, and the terre-tenants altogether. And in a modern case the Court of Exchequer said, that whenever an extent might have issued in a man's lifetime, a writ of *diem clausit extremum* may issue against the estate of a simple contract creditor, where such debt was found by inquisition; though the person was not the king's debtor by record at the time of his death. (a)

62. It is *not necessary* that there should be any *contract* with the king to make a person a crown debtor. For it was resolved in 2 Eliz. that if any money, goods, or chattels of the king come \*to the hands of a subject, by matter of record, or \* 61 by matter in *fact*, the land of such subject is charged therewith. But it was said in Doddington's case, that the party receiving must know it to be the king's money; for if a person sells land to a receiver of the king, who pays him for it with the king's money, and the vendor is not privy to it, he shall not be answerable. (b)

63. Lord Chief Baron Gilbert says, all *debts due to the king are a lien on the lands* of the debtor, from the time when they were contracted;<sup>1</sup> for the debts that were of record always bound

(a) Favel's case. Dyer 160. a. 224. b. Anon. Sav. 53. Rex v. Mitchener, Bunb. 118.

(b) Plowd. 321. (Doddington's case, Cro. El. 545. E. of Devon's case, 11 Rep. 89. Brassey v. Dawson, 2 Stra. 978.)

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<sup>1</sup> The United States have no such lien by prerogative. U. S. v. Canal Bank, 3 Story, R. 80, 81; U. S. v. Hooe, 3 Cranch, 73; Prince v. Bartlett, 8 Cranch, 431; U. S. v. Howland, 4 Wheat. 108; but have only a right of priority of payment, in certain cases, conferred by express statutes. These cases are, (1,) the decease of the debtor, without sufficient assets to pay his debts; (2,) where the debtor, not being able to pay his debts, has made a voluntary assignment of all his property for the general benefit of all his creditors; (3,) where he is absent, or concealed, or has absconded, and his estate and effects are attached by process of law; and (4,) where he has become bankrupt or legally insolvent, the same being manifested by some act pursuant to law. 4 Kent, Comm. 247; 3 Story, R. 81. It is only a priority of payment; and, therefore, does not overreach a prior *bonâ fide* alienation of property. U. S. v. Fisher, 2 Cranch, 358; Conard v. Atlantic Ins. Co., 1 Peters, S. C. R. 439; Brent v. Bank of Washington, 10 Peters, R. 611. Nor does it attach where the voluntary assignment by the debtor is of a part only, and not the whole of his property. U. S. v. Hooe, 3 Cranch, 73; U. S. v. Monroe, 5 Mason, 572; U. S. v. Hawkins, 16 Mart. 317; U. S. v. Clark, 1 Paine, 629. Nor where the conveyance, though of all his property, is to one or more specified creditors, in discharge of their respective debts, not exceeding in value the amount due to them,

the lands of the debtor, and the specialty debts by the Stat. 23 H. 8, c. 6, bind as a statute staple. Therefore, if a person becomes bound to the king in a bond, and process is issued on it, the writ warrants the sheriff to inquire of and seize the lands of  
 62 \* the \* debtor, which he had on the day when the bond was executed. But if a bond be assigned to the king, the process shall not be to inquire of and seize the lands which the obligor had when he entered into bond, but only the lands which the obligor had when the bond was assigned. (a)

64. By the Statute 13 Eliz. c. 4, s. 1, it is enacted, that all the lands, tenements, and hereditaments, which any treasurer or receiver of the courts of exchequer, or duchy of Lancaster, treasurer of the chamber, cofferer of the household, treasurer for the wars, or of the admiralty or navy, or the mint, receiver of any sums of money imprest, or otherwise, for the use of the queen, her heirs or successors, customer, collector, or farmer of the customs within any port of the realm, receiver-general of the revenues of any county or counties, answerable in the receipt of the exchequer, or the duchy of Lancaster, hath, while he remains accountant, shall, for the payment of the queen, her heirs or successors, be liable and put in execution, in like manner as if the same treasurer, receiver, &c., had, the day he became first officer

(a) Gilb. Exch. c. 16, p. 88. Tit. 14 and 32, c. 8.

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and not for the benefit of creditors at large. *U. S. v. McLellan*, 3 Sumn. 345. Nor does it supersede or displace a prior lien, gained by a private creditor by attachment or seizure in execution. *U. S. v. Canal Bank*, 3 Story, R. 79; *Wilcox v. Waln*, 10 S. & R. 380; *U. S. v. Mechanic's Bank*, Gilpin, R. 51; *Prince v. Bartlett*, 8 Cranch, 431. Neither does it extend to estate vested in the heirs of a deceased insolvent; but only to the proceeds of such estate in the hands of his executor or administrator. *U. S. v. Crookshank*, 1 Edw. Ch. R. 233. Nor to take partnership property, for the payment of a private debt of one of the partners, until the partnership creditors are satisfied. *U. S. v. Hack*, 8 Peters, R. 271. Nor to defeat the widow of an insolvent debtor, of her allowance out of the estate, in the discretion of the Judge of Probate. *The Postmaster-General v. Robbins*, Ware, R. 165. Nor does it take effect at all, while the property remains in the debtor's hands undivested, though he be insolvent in fact. *Beaston v. Farmer's Bank*, 12 Peters, R. 102. See also 4 Kent, Comm. 243—248. But the United States have a prior lien on goods imported, for the duties accruing thereon, which is paramount to any attachment of them on process at the suit of a private creditor. *Harris v. Dennie*, 3 Peters, R. 292. And sureties in a bond for such duties, or other penalty due to the United States, on paying the bond, are subrogated to the priority and advantages belonging to the United States. Stat. U. S. 1792, ch. 23, § 18; Stat. U. S. 1799, ch. 110, § 65. (1 Peter's ed. p. 263, 676.) *Hunter v. U. States*, 5 Peters, R. 173.

or accountant, stood bound by writing obligatory, having the effect of a statute staple, to her majesty, her heirs or successors, for payment of the same.

65. Where lands are once liable to a crown debt, the lien continues, *into whose hands soever they pass*; even though conveyed by the debtor *bonâ fide* to a purchaser for valuable consideration. Thus it is said that if a man becomes debtor to the king, being seised of land in fee, and after aliens the land, yet it may be put in execution, though the alienation was before any action commenced; for it relates to the time when he became indebted to the king, and after. (a)

66. The only proper and legal *discharge of a debt due to the crown* is an acquittance from the officers of the exchequer, which is usually called a *quietus*, because it generally concluded with these words,—*abinde recessit quietus*. And by the Stat. 27 Eliz. c. 3, it is enacted, That if an accountant or debtor to the crown obtains a *quietus* in his lifetime, his lands shall not be sold after his death.† (b)

67. Estates in fee simple are *forfeited* to the crown *by attainder of treason*;¹ and the lands whereof a person so attainted dies seised in fee simple, become vested in the crown, without any office; because they cannot descend on account of the corruption

(a) 2 Rôll. Ab. 156, pl. 1. Vide tit. 32, c. 27.

(b) Poole v. Shergold, 1 Cox, R. 160. Vide tit. 14.

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[† The Stat. 1 and 2 Geo. 4, c. 121, s. 10, provides, That when the estate of an accountant to the crown is sold under an extent or decree of the Courts of Chancery or Exchequer, and the purchaser pays his money into the Exchequer, from the \*entry of such payment by the commissioners for auditing public accounts, the \*63 purchaser, his heirs and assigns, shall be wholly discharged from all further claims by the crown, although the money shall not be sufficient to discharge the whole debt. In this particular case the estate would be exonerated although the crown debtor should not obtain his *quietus*.

By the 9 Geo. 3, c. 16, called the *Nullum Tempus Act*, the crown is disabled from suing for the recovery of any lands, tenements, or hereditaments, where its right shall not have accrued within a period of sixty years next before. *Goodtitle v. Baldwin*, 11 East's Rep. 488. The recent statute of limitations, 3 & 4 Will. 4, c. 27, does not appear to affect remedies of the crown against the crown debtor.]

¹ Forfeiture for treason against the United States is abolished, by Stat. Apr. 20, 1790, c. 9; but it still exists, by common law, for treason against those individual States which have not expressly abolished it. 2 Kent, Comm. p. 386. In *New York*, the judgment of outlawry after conviction for treason works a forfeiture of the party's freehold estates during his life, and of all his goods and chattels. *Rev. St. New York*, 1846, Vol. II. p. 746, § 3. See *post*, tit. 29, ch. 2, § 20, note; tit. 30, § 11, note.

of blood of the person last seised; and the freehold shall not be in abeyance. (a)

68. This forfeiture relates backwards to the time when the crime was committed, so as to avoid all intermediate sales and incumbrances, but not those made before. (b)

69. In cases of petty treason and felony, the estate is only forfeited to the crown for a year and a day, which was formerly called the *annum diem et vastum*. After that period, in consequence of the corruption of blood, it escheats [in the cases of petty treason and murder] to the lord of whom it is held,† (c)

70. An estate in fee simple is still so far considered as a strict feud, and the tenant thereof so far bound to perform the feudal duties and services, that if he disclaims upon record to hold his lands of his lord, it will operate as a forfeiture of his estate; and the lord may thereupon have a writ of right upon a disclaimer‡ for the recovery of the land. But if the lord accepts rent from the tenant after the disclaimer, he will be thereby barred of this writ. (d)

71. "Of fee simple, (says Lord Coke,) it is commonly holden that there be three kinds, viz., fee simple absolute, fee simple conditional, and *fee simple qualified* or a *base fee*. But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz., simple or absolute, conditional, and qualified or base; for this word *simple* properly excludeth both conditions and limitations that defeat or abridge the fee." (e)

(a) 2 Hawk. P. C. c. 4. s. 1.

(b) 1 Inst. 390. b.

(c) 1 Hale, P. C. 360. Rex v. Morphey, 1 Salk. 85. Tit. 30.

(d) Dissert. c. 1. s. 76. 1 Inst. 102. a. Booth, R. Act. 133. 3 Leon. 271. (e) 1 Inst. 1. b.

[† By the Stat. 54 Geo. 3, c. 145, no attainder for felony, save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same.

64\* It would appear that this act leaves the offender the \*power of disposing of his estate in reversion expectant upon his decease.

Trust estates in fee simple are forfeited to the crown for treason, but they do not escheat to the lord for felony. Tit. 12, c. 2, s. 25—28.]

[‡ This writ was abolished after the first of June, 1835, by Stat. 3 & 4 Will. 4, c. 27, s. 36, 37, 38.]

72. The nature of an estate in fee simple absolute has been already explained. But where an estate limited to a person and his heirs has a qualification annexed to it, by which it is provided that it must determine whenever that qualification is at an end, it is then called a qualified or base fee. As in the case of a grant to A and his heirs, tenants of the manor of Dale, whenever the heirs of A cease to be tenants of that manor, their estate determines. (a)

73. Lord Hale gives the following instance of a qualified or base fee. King Henry III. *dedit manerium de Penrith et Sourby Alexandro, regi Scotiæ, et hæredibus suis, regibus Scotiæ*. Alexander died, not leaving any heir king of Scotland, but only daughters; *et eâ de causâ*, King Edward I. recovered seisin, and the coheirs of Alexander were excluded. So where King Edward III. gave lands to the Black Prince, and to his heirs, kings of England, it was held that the grantee had a qualified fee; and having died in the lifetime of his father, so that his son did not then become king of England, the land reverted. (b)

74. In a modern case the Court of King's Bench certified to the chancellor that a devise to trustees and their heirs, upon trust to pay the testator's debts and legacies; and after payment \*thereof, to his sister for life, &c., gave a base \*65 fee to the trustees, determinable on payment of the debts and legacies. (c)

75. Where a person holds his estate to him and his heirs, as long as A B has heirs of his body; this is a species of qualified or base fee,† of which a more particular account will be given in the next title. (d)

76. The proprietor of a qualified or base fee has the same

(a) 1 Inst. 27. u.

(b) Id. n. 6. 1 Rep. 137. b.

(c) Willington v. Willington, 1 Bla. Rep. 645. S. C. 4 Bur. 2165. See also Gibson v. Lord Montfort, 1 Ves. 485.

(d) 10 Rep. 97. b.

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[† This occurs where a tenant in tail, not being seised of the immediate reversion in fee, has levied a fine with proclamations to a stranger in fee. The issue under the entail are barred by the fine of their ancestor from claiming the estate; and the stranger has a fee so long as there are issue under the entail; by this process the character of the estate tail is changed and becomes a qualified or base fee, determinable on failure of the issue under the entail; it was until the late act of 3 & 4 Will. 4, c. 74, s. 39, capable of merger by union with the ultimate reversion in fee, which, so long as it continued an estate tail, could not have taken place.]

rights and privileges over his estate, till the qualification upon which it is limited is at an end, as if he were tenant in fee simple. (a)

With respect to conditional fees, they will be treated of in the next title.

(a) Plowd. 557.



## TITLE II.

## ESTATE TAIL.

## BOOKS OF REFERENCE UNDER THIS TITLE.

LITTLETON's Tenures.

COKE upon LITTLETON.

PRESTON on Estates, ch. 7, 8, 9, 10, 11.

BLACKSTONE'S COMMENTARIES, Book II. ch. 7.

FLINTOFF on Real Property. Vol. II. Book I. ch. 3.

KENT'S COMMENTARIES. Lect. 54.

LOMAX's Digest. Tit. 2.

## CHAP. I.

## OF THE ORIGIN AND NATURE OF ESTATES TAIL.

## CHAP. II.

OF THE POWER OF TENANT IN TAIL OVER HIS ESTATE, AND THE  
MODES OF BARRING IT.

## CHAP. I.

## OF THE ORIGIN AND NATURE OF ESTATES TAIL.

SECT. 1. <i>Of Conditional Fees.</i>	SECT. 30. <i>Who may be Tenants in Tail.</i>
8. <i>Statute de Donis.</i> "	31. <i>Incidents to Estates Tail.</i>
12. <i>Description of an Estate Tail.</i>	32. <i>Power to commit Waste.</i>
13. <i>Tail General and Special.</i>	36. <i>Subject to Curtesy and Dower.</i>
14. <i>Tail Male and Female.</i>	37. <i>But not to Merger.</i>
17. <i>Estates in Frank Marriage.</i>	39. <i>Tenant in Tail entitled to the</i> <i>Deeds.</i>
19. <i>Estates Tail are held of the</i> <i>Donor.</i> "	40. <i>Is not bound to pay off In-</i> <i>cumbrances.</i>
22. <i>How Created.</i>	
23. <i>What may be Entailed.</i>	

SECTION 1. Donations of land were originally simple and pure, without any condition or modification annexed to them ; and the estates created by such donations were held in fee simple. In course of time, however, it became customary to make donations of a more limited nature, by which the gift was restrained to

some particular heirs of the donee, exclusive of others; as to the heirs of a man's body, by which only his lineal descendants were admitted, \*in exclusion of collateral heirs; or to the heirs male of his body, in exclusion both of collateral heirs, and lineal female heirs.

2. Thus Bracton, in treating of donations, says:—*Item sicut ampliari possunt hæredes, sicut prædictum est, ita coarctari poterunt per modum donationis, quod omnes hæredes generaliter ad successionem non vocantur. Modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem. Ut si dicatur—Do tali tantam terram cum pertinentiis in N. habendam et tenendam sibi et hæredibus suis, quos de carne suâ et uxore sibi desponsatâ procreatos habuerit. Vel sic—Do tali, et tali uxori suæ, vel cum tali filiâ meâ, &c., habendum et tenendum sibi et hæredibus suis, de carne talis uxoris, vel filiae exeuntibus, vel procreatis vel procreandis; quo casu cum certi hæredes exprimantur in donatione, videre poterit quod tantum sit descensus ad ipsos hæredes communes per modum in donatione appositum; omnibus aliis hæredibus suis a successione penitus exclusis, quia hoc voluit donator. (a)*

3. These limited donations were evidently derived from the *feudum talliatum*, of which an account has been already given, and were probably introduced into England about the end of the reign of King Henry II. or that of one of his sons; for Glanville, who gives a very minute account of the different estates in land that were known in his time, makes no mention of limited donations; whereas we have seen that Bracton, who wrote in the reign of King Henry III., has given a full description of them. (b)

4. As the proprietors of estates held in fee simple had, at that period, acquired a power of alienation, there can be no doubt but that these limited donations were introduced for the purpose of restraining that right. But the general propensity which then prevailed to favor a liberty of alienation induced the courts of justice to construe limitations of this kind in a very liberal manner. Instead of declaring that these estates were descendible to those heirs only who were particularly described in the grant, according to the manifest intention of the donors, and the strict

(a) Bract. lib. 2. c. 6. 17. b. Fleta, lib. 3. c. 9. Britton, c. 36.

(b) Dissert. c. 1. s. 67.

principles of the feudal law;† and that the donees should not, \*in any case, be enabled by their alienation to defeat \* 68 the succession of those who were mentioned in the gift, or the donor's right of reverter; they had recourse to an ingenious device taken from the nature of a condition.

5. Now it is a maxim of the common law that when a condition is once performed, it is thenceforth entirely gone; and the thing to which it was before annexed becomes absolute and wholly unconditional. The judges' reasoning upon this ground determined that these estates were *conditional fees*, that is, were granted to a man and the heirs of his body, upon condition that he had such heirs; therefore as soon as the donee of an estate of this kind had issue born, his estate became absolute by the performance of the condition; at least for these three purposes.

1. To enable him to alien the land, and thereby to bar, not only his own issue, but also the donor, of his right of reverter. 2. To subject him to forfeit the estate for treason or felony; which till issue born he could not do, for any longer term than that of his own life; lest the right of inheritance of the issue, and that of reverter of the donor, might be thereby defeated. 3. To enable him to charge the lands with rents and other incumbrances, so as to bind his issue. (a)

6. The donee of a conditional fee might also alien the lands before issue had; nor could the donor have entered in such a case, because that would have been contrary to his own donation, which limited the lands to the donee and his issue. And if the donee had issue, born after the alienation, the donor was excluded during the existence of such issue. The issue were also bound by the alienation of their ancestor, though previous to their birth, because they could only claim in the character of his representatives; and were, therefore, barred by his acts. But where the donee of a conditional fee aliened before he had issue, such alienation did not bar the donor's right of reverter, whenever there happened a failure of issue; because the subsequent birth

(a) Tit. 13. c. 2. Plowd. 235, 241. 1 Inst. 19. a. 2—333. 7 Rep. 34. b.

[† Jus feudale non solum tallis non adversari, sed maxime eis favere constat: non solum quod nullas fœminas ad successionem admittet, sed multo magis, quod tenorem successionis semper servandum jubeat; hæreditatemque secundum eam deferendam expressè jubeat. *Craig, lib. 2, tit. 16, § 3.*]

of issue was not a sufficient performance of the condition to render the precedent alienation valid. (a)

7. Where the person to whom a conditional fee was granted had issue, and suffered it to descend to such issue, they might alien it; because having succeeded by descent to the estate of their ancestor, who had acquired a power of alienation by having issue, they took the estate in the same manner, discharged  
69\* from any restraint whatever. But if the issue did not alien, the donor would still be entitled to his right of reverter, as the estate would have continued subject to the limitations contained in the original donation. (b)

8. From this mode of construing conditional fees, the purposes for which they were intended were completely frustrated; and, therefore, the nobility, in order to perpetuate their possessions in their own families, procured the Statute of Westm. 2, 13 Edw. 1, usually called the statute *De Donis Conditionalibus*, to be made; which, after reciting the right of alienation assumed by the donees of conditional fees, enacts ["That the will of the giver, according to the form in the deed of gift manifestly expressed, should be observed, so that they to whom a tenement was so given under condition, should not have power to alien the same tenement, whereby it should not remain after the death of the donees, to their issue, or to the donor or his heir if issue failed."†]

9. This statute, as Lord Mansfield has justly observed, only repeated what the law of tenures had said before, that the tenor of the grant should be observed; and, therefore, the judges, in the construction of it, held that where an estate was limited to a man and the heirs of his body, the donee should not in future have a conditional fee, but divided the estates, by creating a particular estate in the donee, called an estate tail, subject to which the reversion in fee remained in the donor. (c)

(a) Plowd. 241. (b) 1 Inst. 19. a. (c) 1 Burr. 115. Plowd. 248. 2 Inst. 335.

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[† The words of the original are: "*Domini rex statuit quod voluntas donatoris, secundum formam in charta doni sui manifestè expressum, de cætero observetur, ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus, ad exitum illorum quibus tenementum sic fuerit datum, remaneat post eorum obitum; vel ad donatorem, vel ad ejus hæredem, si exitus deficiat, revertatur; per hoc quod nullus sit exitus omnino; vel si aliquis exitus fuerit, et per mortem deficiet, hærede de corpore hujusmodi exitus deficiente.*"]

10. In consequence of this construction, estates thus limited are not conditional; nor is the right of entry of the donor, on failure of issue of the donee, considered as arising from a breach of the condition, but as a right of reverter, accruing to the donor on the natural expiration of the estate granted. The statute rejects the erroneous opinion which had been held by the judges, that a donation of this kind created a conditional fee; and declares that it vests an estate of inheritance in the donee, and some particular heirs of his, to whom it must descend, notwithstanding\* any act of the ancestor; and that the \*70 estate of the donor is a reversion expectant on the determination of that estate. (a)

11. The statute *De Donis* was made in the reign of a prince who, from the great number and excellence of his laws, has justly acquired the title of the English Justinian. It is, therefore, highly probable that he was induced by some motives unknown to modern times, to give his assent to a law, which, by allowing the nobility to entail their estates, made it impossible to diminish the property of the great families, and at the same time left them all means of increase and acquisition. (b)

12. An *estate tail* may be described to be an estate of inheritance, deriving its existence from the statute *De Donis Conditionalibus*; which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general. It is called an estate tail, or a fee tail, from its similarity to the *feodum talliatum*, which appears to have been well known at that time; as it is mentioned in the forty-sixth chapter of this statute; where, in enumerating several kinds of estates, it is said,—“*ad terminum vitæ, vel annorum, vel per feodum talliatum.*” And note, (says Littleton, s. 18,) that this word *talliare* is the same as to set to some certainty, or to limit to some certain inheritance. And for that it is limited and put in certain what issue shall inherit by force of such gifts, and how long the inheritance shall endure, it is called in Latin,—“*Feodum talliatum, i. e. Hereditas in quamdam certitudinem limitata.*”<sup>1</sup>

(a) 1 Burr. 115. Plowd. 248. 2 Inst. 335. Plowd. 242. (b) 1 Inst. 19. a. 392. b.

<sup>1</sup> See Carpentier, Glossarium, voc. *Talliare*, 2. Ante, Tenures, ch. 1, § 67.

[The law of descent of Massachusetts does not abrogate the rule of the common law in regard to estates tail, but leaves them as they stood at common law. *Wight v. Thayer*, 1 Gray, 286.]

13. Tenant in tail is in two manners; tenant in tail general, and tenant in tail special. Where lands are given to a man and the heirs of his body, without any farther restriction, it is an estate in *tail general*; because, how often soever such donee in tail be married, his issue by every such marriage is capable of inheriting the estate tail. But if the gift is restrained to certain heirs of the donee's body, exclusive of others, as where lands are given to a man and the heirs of his body, on Mary his present wife to be begotten, it is an estate in *tail special*; and the issue of the donee by any other wife is excluded. (a)

14. If lands are given to a person and the heirs male of his or her body, this is called an estate in *tail male*, to which the heirs female are not inheritable. On the other side, if lands are given to a person and the heirs female of his or her body, 71\* this is \* called an estate in *tail female*, to which the heirs male are not inheritable. Mr. Hargrave says it is very unusual to create an estate in tail female; that he had seen an argument in which it had been attempted to prove that the law of England will not allow of a descent through females only, even in the case of estates tail, but that other authors, as well as Littleton and Coke, mention such descents; nor did he ever hear any authority cited to support the contrary doctrine. (b)

15. In all instances of special entails, which limit the lands to one particular class of heirs, no descendant of the donee can make himself inheritable to such a gift, unless he can deduce his descent through that particular class of heirs, to which the succession of the land was limited. Therefore if lands be given to a man and the heirs male of his body, and he has issue a daughter, who has issue a son, this son can never inherit the estate; for being obliged to claim through the daughter, he must necessarily show himself out of the words of the gift, which limited the lands to the heirs male only of the donee, which the daughter cannot be. (c)

16. For the same reason, if lands be given to a man and the heirs male of his body, remainder to him and the heirs female of his body; and the donee has issue a son, who has issue a daughter, who has issue a son; this son cannot inherit either of

(a) Lit. s. 13, 15.

(b) Lit. s. 21, 22. 1 Inst. 25, a. n.

(c) Lit. s. 24. (Hulbert v. Emerson, 16 Mass. R. 241, 243,) Den v. Hobson, 2 Black. R. 695.

the estates, because he cannot deduce his descent wholly either through the male or the female line.<sup>1</sup> (a)

17. It was formerly a practice for a person to give lands to another, as a marriage portion with his daughter or cousin, to hold to the husband and wife in *frank marriage*; by which the lands became descendible to the issue of such marriage. Thus Glanville says:—*Liberum dicitur maritagium quando aliquis liber homo aliquam partem terræ suæ dat, cum aliquâ muliere, alicui in maritagium.* And Finch has observed that lands could not be given in frank marriage with a man that was cousin to the donor; but always with a woman. (b)

18. The judges had construed gifts in frank marriage in the same manner as donations to persons and the heirs of their bodies; by which means they were considered to be conditional fees, and consequently alienable after issue had. But this construction being evidently contrary to the intention of the persons who had created such estates, the statute *De Donis*, after \*reciting the case of a gift in frank marriage, comprises \*72 it in the remedial part of that law; by which means gifts of this kind became estates in tail special, and the donees were restrained from alienating them. (c)

19. We have seen that in consequence of the statute *quia emptores*,<sup>2</sup> where a person conveys away his whole estate, he cannot reserve any tenure to himself; but this statute only extends to those cases where the entire fee simple is transferred. Therefore where a tenant in fee simple grants an estate tail out of it, the tenant in tail will *hold of the donor*, and not of the chief lord. (d)

20. Where the donor of an estate tail grants over his reversion to a stranger, the donee of the estate tail will hold of such stranger. But if lands be given to A in tail, with remainder in fee to a stranger, the donee of the estate tail will hold of the chief lord; because the whole estate is conveyed away. (e)

(a) 1 Inst. 25. b.

(b) Glanv. lib. 7. c. 18. Finch, B. 2. c. 3. 29. a.

(c) 1 Inst. 21. a.

(d) Dissert. c. 2. s. 13. 1 Inst. 23. a. 2—505. Plowd. 287.

(e) 2 Inst. 505. 2 Rep. 92. a. Dyer, 362. b.

<sup>1</sup> To enable the last son to take, the second limitation should have been general, to the heirs of the donee.

<sup>2</sup> This statute was never adopted or held in force in Pennsylvania. *Ingersoll v. Sargent*, 1 Whart. 337.

21. Where the tenant in tail has also the reversion in fee in himself, as he cannot hold of himself, it being a maxim in law that *nemo potest esse tenens et dominus*, he shall hold of the superior lord. (a)

22. The statute *De Donis* speaks only of *three modes* of creating an estate tail; namely, by a gift to a *man and his wife* and to the heirs of *their bodies*; a gift in *frank marriage*, and a gift to a person and the *heirs of his body* issuing. Yet if lands be given to a person and his heirs, and if the donee dies without heirs of his body, that it shall remain to another, this shall be an estate tail, by the equity of the statute, though it be out of the words. For the makers of the act did not mean to enumerate all the forms of estates tail, but to put these examples; so as all manner of estates tail general or special are within the purview of the act. For, as it is said by Hales, Justice, at the common law, the intent of the donor was infringed and eluded, which was contrary to right and good conscience; and, therefore, the statute, being made to restrain that vicious liberty of breaking such intents, which was suffered by the common law, shall be extended by equity. (b) <sup>1</sup>

23. With respect to the *kind of property on which the statute De Donis was meant to operate*, the only word in the statute is *tenementum*, which has been shown to signify every thing that may be holden, provided it be of a *permanent nature*; so  
73\* that,\* not only lands may be entailed, but also every species of incorporeal *property of a real nature*, as will be shown hereafter. (c)

24. Mr. Hargrave observes that *two things* seem essential to an entail within the statute *De Donis*. 1. That the subject be land, or something of a *real nature*. 2. That the estate in it be an estate of *inheritance*. It is not, however, necessary that the thing to be entailed should issue out of lands; for if it be annexed to lands, or in any wise concern lands, or relate to them, it may be entailed. (d)

25. Thus Lord Coke says, that estovers, common, or other

(a) *Infra*, s. 33.

(b) 2 Inst. 334. Tit. 32. c. 31. Plowd. 53. Tit. 38. c. 12. (Steel v. Cook, 1 Met. 281.)

(c) Tit. 1.

(d) 1 Inst. 20. a. n. 5.

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[<sup>1</sup> Maslin v. Thomas, 8 Gill, 18.]



*profits* whatsoever, *granted out of land*, may be entailed. So the office of sergeant of the Common Pleas, and the office of keeper of a church, may be entailed; as also the office of steward, receiver, or bailiff of a manor. (a)

26. It has been stated that *money* directed to be laid out in the *purchase of land* is considered in equity as land. In such case, if the land to be purchased is directed to be conveyed to a person in tail, he will be considered in equity as tenant in tail of the money, till the purchase is made. (b)

27. As to *inheritances merely personal*, which neither issue out of, nor relate to land, or some certain place, and which are not demandable *ut tenementa*, in a *præcipe*, they cannot be entailed within the statute *De Donis*. So that when things of this nature are limited to a person, and the heirs of his body, the donee takes a *conditional fee*; and may dispose of the property as soon as he has issue. (c)

28. An *annuity* which only charges the *person* of the grantor, and not his lands, though it may be granted in fee, cannot be entailed.<sup>1</sup> In a modern case, Lord Hardwicke held that an annuity in fee simple, granted by the crown out of the four and a half *per cent.* duties, payable for imports and exports at the island of Barbadoes, was merely a personal inheritance, not entailable within the statute *De Donis*; therefore, that being settled upon A and the heirs of his body, it was a conditional fee at common law; so that A having issue might alien it, and thereby bar the possibility of reverter. (d)

29. It was held by Lord Thurlow, in a modern case, that an annuity granted by act of Parliament out of the revenues of the

(a) 1 Inst. 20. a. 7 Rep. 33. b.

(b) Tit. 1. s. 4. *Infra*, ch. 2. s. 65.

(c) 1 Inst. 20. a.

(d) 1 Inst. 20. a. n. 5. *Stafford v. Buckley*, 2 Ves. 170. In *Aubin v. Daly*, 4 B. & Ald. 59, this annuity was held to be personal estate, and to pass under a will attested by two witnesses only.

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<sup>1</sup> An annuity is a yearly sum of money, payable to the grantee, and charging the person only of the grantor. Co. Lit. 144, b. If granted to the party and his heirs, it is an incorporeal hereditament; but it is only personal, unless the real estate is also charged by the terms of the grant; in which case it may be real estate, though still generally termed an annuity; for the grantee may recover by writ of annuity, in which case the land is discharged; or he may distrain for the arrears, and so make it real by charging the land. Co. Lit. 20, a. 144, b; Lit. § 219; Doctor & Student, ch. 30; *Horton v. Cook*, 10 Watts, 124, 127; 2 Bl. Comm. 40; *Aubin v. Daly*, 4 B. & A. 59.

post-office, redeemable upon payment of a sum of money, to be laid out in land, was a personal inheritance only, not entailable \*within the statute *De Donis*; for that notwithstanding the power reserved to the crown of laying it out in land, the parties had a right to treat it as an annuity; and the Court of Chancery would not keep the objection, of its being land, in contemplation from century to century, because of the possibility of substituting the money in the place of the annuity. (a)

30. *All natural persons* capable of holding estates of inheritance in land, *may be tenants in tail*. And it was solemnly determined in 4 Eliz., that the king was within the statute *De Donis*, as well as a common person; because the statute was made to remedy the error which had crept into the law, that the donee had the power of alienating an estate given to him, and the heirs of his body, after issue had; and to restore the common law, in this point, to its right and just course; which it did, by restoring to the donor the observance of his intent. And when the statute *De Donis* ordained that the will of the donor should be observed, it made his will to be a law, as well against the king as against another. (b)

31. Estates tail, like estates in fee simple, have certain *incidents* inseparably annexed to them, which cannot be restrained by any proviso or condition whatever.

32. The *first* of these is, that as a tenant in tail has an estate of inheritance, he has a *right to commit every kind of waste*; by felling timber, pulling down houses, opening and working mines, &c. But this power must be exercised during the life of the tenant in tail, for at the instant of his death it ceases. If, therefore, a tenant in tail sells trees growing on the land, the vendee must cut them down during the life of the vendor, otherwise they will descend to the heir as parcel of the inheritance. (c)

33. It is said by Clark, Justice, in 27 Eliz., that if a tenant in tail grants away all his estate, the grantee is dispunishable for waste. So if the grantee grants it over, his grantee is also dispunishable. (d)

34. The Court of Chancery will not, in any case whatever,

(a) *Holderness v. Carmarthen*, 1 Bro. C. C. 377.

(b) *Willion v. Berkeley*, Plowd. 227. 7 Rep. 32. a.

(c) Plowd. 259. 11 Rep. 50. a.

(d) 3 Leon. 121.

restrain a tenant in tail from committing waste. Thus Lord Talbot is reported to have said that in Mr. Saville's case, who being an infant, and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, his guardian cut down a quantity of timber, just before his death. The remainderman applied for an injunction to restrain him, but could not prevail. (a)

\*35. A bond to restrain a tenant in tail from committing waste is void. Thus where a person settled lands on his daughter, and the heirs of her body; and took a bond from her not to commit waste; the bond was put in suit; but the Court held it to be an idle bond, and decreed it to be delivered up to be cancelled. (b)

36. Estates tail are *subject to the curtesy* of the husband, and the *dower* of the wife, which are incidents inseparably annexed to them, as will be noticed under these titles.

37. It has been stated that whenever a particular estate in land vests in the person who has the fee simple in the same land, such particular estate is immediately drowned or merged in it. In consequence of this principle, if an estate has been given, before the statute *De Donis*, to A, and the heirs of his body, if the fee simple was limited to A by the same conveyance, or came to him afterwards, the estate tail would have become merged. But it was determined by the judges in the reign of Edward III. that *an estate tail could not be merged, surrendered, or extinguished*, by the accession of the greater estate. So that a man may have at the same time, and in his own right, both an estate tail, and the immediate reversion in fee simple, in the same land.

38. The reason of this determination was, that the object of the statute *De Donis* being to render estates tail unalienable, if they were allowed to merge in the fee simple, an obvious mode of destroying them might have been adopted by the tenant in tail purchasing the reversion. (c)

39. Tenant in tail, having an estate of inheritance, *has a right*

(a) Talbot, 16. Mos. R. 224. Att. General v. Duke of Marlborough, 3 Mad. 498.

(b) Jervis v. Bruton, 2 Vern. 251.

(c) Tit. 1. Plowd. 296. 2 Rep. 61, a.

to all deeds and muniments belonging to the lands;<sup>1</sup> which the Court of Chancery will order to be given up to him.† (a)

40. Tenant in tail having only a particular estate, and not the entire property, he is not bound to pay off any charges or incumbrances affecting the estate. But where a tenant in tail does pay off an incumbrance charged on the fee simple, the presumption is that such payment was made in exoneration of the estate; because he may, if he pleases, acquire the absolute ownership. But the tenant in tail may, by taking an assignment of the incumbrance to a trustee for himself, or by several other acts, charge the estate with the payment of such incumbrance. (b)

76 \* 41. The Earl of Shrewsbury being tenant in tail under an act of Parliament, which restrained him from alienation, unless he conformed to the established religion, and being a Roman Catholic, paid off a sum of £15,000 charged on the estate for his sisters' portions, without taking any assignment of the term by which that sum was secured, or any declaration of trust of it for himself. In 1751, Lord S., by deed, reciting that he was seised of the freehold, subject to this charge, that he had paid off the portion of one of his sisters, and part of the portion of another, and that, as none of the portions had been raised under the terms, he had a right to have them raised for himself; he, in consideration of £1,000, conveyed an advowson, being part of the premises comprised in the term, to one Robinson; the trustees consented, and were parties, upon condition that the consideration should go in discharge of the portions. Lord S. died in 1787, leaving a will; but without taking any notice of his right to be reimbursed this sum, or doing any other act by which his intention could be known. A bill was brought by his

(a) Papillon v. Voice, 2 P. Ws. 471.

(b) Jones v. Morgan, 1 Bro. R. 206. Tit. 12, c. 3, s. 12. Kirkham v. Smith, tit. 15, c. 4.

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<sup>1</sup> In the United States, it is the general practice for the grantor to retain his own title deeds, instead of delivering them over to the grantee; and the grantee is not ordinarily bound, in deducing his title, to produce any original deeds to which he was not a party; but, the practice of registration being universal, he is permitted to read in evidence certified copies from the Registry, of all such deeds of which he is not supposed to have the control. 1 Greenl. on Evid. § 571, note (3.) Whether, therefore, a Court of Equity would here decree the delivery over of such title deeds, may be questioned. See *post*, tit. 32, ch. 11, § 19, note.

[† He who is entitled to the land has also a right to the title deeds affecting it. *Harrington v. Price*, 3 Barn. & Adol. 170.]

personal representative against the next tenant in tail, and the trustees of the term, praying that they might be compelled to raise such sums as were paid by the late earl to his sisters. Lord Thurlow said that, in the transaction of 1751, respecting the advowson, there was a perfect and distinct recognition that the circumstance of paying off the charge did make Lord S. a creditor; and decreed for the plaintiff. (*a*)

42. It was formerly held that a tenant in tail was not even bound to pay the interest of any incumbrances charged on the estate; but it has since been resolved that in some cases he is bound to keep down the interest. (*b*)

(*a*) *Shrewsbury v. Shrewsbury*, 1 Ves. Jun. 227. 15 Ves. 173.

(*b*) Tit. 15, c. 4.

## CHAP. II.

POWER OF TENANT IN TAIL OVER HIS ESTATE, AND MODES OF  
BARRING IT.

SECT. 1. <i>Could only alien for his own Life.</i>	SECT. 27. <i>Unless he confirms them.</i>
4. <i>His Alienation not absolutely void.</i>	29. <i>Nor subject to his Debts.</i>
6. <i>Sometimes a Discontinuance.</i>	30. <i>Except Crown Debts.</i>
11. <i>Sometimes voidable by Entry.</i>	35. <i>Tenants in Tail may make Leases.</i>
13. <i>When it creates a base Fee.</i>	36. <i>Are subject to the Bankrupt Laws.</i>
16. <i>Cannot limit an Estate to commence after his Death.</i>	37. <i>And to Forfeiture for Treason.</i>
19. <i>Exception.</i>	43. <i>But not for Felony.</i>
20. <i>The Issue not bound by his Ancestor's Contracts.</i>	44. <i>Modes of barring Estates Tail.</i>

SECTION 1. The statute *De Donis* effecting a perpetuity *restrained* the tenant in tail *from alienating* his estate, by any mode whatever, for *a greater interest than that of his own life*. Thus Littleton says, s. 650, "If tenant in tail grants all his estate to another, the grantee has no estate but for term of life of the tenant in tail, and the reversion of the tail is not in the tenant in tail; because he has granted all his estate, and his right," &c.

2. It is, however, observable, that the words of the statute *De Donis*, by which the alienation of an estate tail is prohibited, only extend to the original donee, and not to his issue—*nec habeant illi, quibus tenementum sic fuerit datum, potestatem alienandi*. But still the prohibition was extended by the judges to the issue *in infinitum*. And Broke says, the omission of the heirs of the donee in the statute, was a misprision of the clerk. (a)

3. Lord Coke, in his comment on this statute, says,—“It was adjudged by Beesford that the issues in tail should not alien,

(a) Plowd. 13. T. Jones, 239. Ab. Tit. Parl. 91.

\* no more than they to whom the land was given, and that \*78 was the intent of the makers of the act; and it was but their negligence that it was omitted, as there it is said. In this case by way of purchase, the land is given to the donees, and by way of limitation to the issues in tail; and, therefore, by a benign interpretation, the purview of this extends to the issues in tail.”(a)

4. Although the statute *De Donis* restrained tenants in tail from alienating their estates for any longer interest than that of their own lives; yet this must not be understood literally, that the grantee had only an estate for the life of the tenant in tail, which determined *ipso facto* by the death of the tenant in tail. All that was meant, was, that *the grantee's estate* was certain and *indefeasible during the life of the tenant in tail only*, upon whose death it became defeasible by his issue, or the remainderman or reversioner. (b)

5. It was, however, *otherwise*, where any thing was *granted out of an estate* that was entailed, as a rent, &c.; for such grant became absolutely void by the death of the grantor, and could never be made good. (c)

6. The law considers the tenant in tail as having not only the possession, but also the right of possession and inheritance, in him; he has, therefore, been allowed to alienate them by certain modes of conveyance, so as to take away the entry of the issue, and drive him to his action, which is called a *discontinuance*. For—“seeing he had an estate of inheritance, the judges compared it to the case where a man was seised in right of his wife, or a bishop in right of his bishopric, or an abbot in right of his monastery.” (d)

7. An estate tail might, at the common law,<sup>1</sup> be *discontinued* by *five* different modes of conveyance; namely, by a *feoffment*, *fine*, *release*, *confirmation*, (the two latter accompanied with warranty,)<sup>2</sup> and by a *recovery not duly suffered*, as where there is no voucher

(a) 2 Inst. 336.

(b) 2 Ld. Raym. 779.

(c) *Walter v. Bould*, Bulst. 32.

(d) Lit. s. 595. 2 Inst. 335. 1—325. a.

<sup>1</sup> Now altered in England by Statutes 3 & 4 W. 4, c. 27 & 74.

<sup>2</sup> There can be no discontinuance without transmutation of the possession. But a bargain and sale, covenant to stand seised, or release, *with a general warranty annexed*, may produce a discontinuance, when the warranty descends upon him who has right to the lands; though not if it descends upon a stranger. Co. Lit. 329, a.; *Stevens v. Winship*, 1 Pick. 318, 328; and see *Mayson v. Sexton*, 1 Har. & McHen. 275; *Hopkins v. Threlkeld*, 3 Har. & McHen. 443.

over of tenant in tail, so as to bar the issue or remainders over. A *recovery duly suffered* has been sometimes termed a discontinuance, but from its peculiar operation it is an *absolute conveyance* by the tenant in tail. (a)

8. No discontinuance, strictly speaking, could be effected by what was termed an innocent conveyance of the tenant  
79 \* in tail in \*possession, such as lease and release, covenant to stand seised, or bargain and sale and grant.

9. The effect of a discontinuance was to pass a fee simple under a new and wrongful title, and to divest the estates in remainder and reversion, taking away from the discontinuees their right of entry, and putting them to their right of action. And to work a discontinuance, the tenant in tail must be tenant in tail in possession. (b)

10. But where the reversion and remainder could not be discontinued, the tenant in tail could not discontinue the estate tail; as where the reversion or remainder was in the crown; for the king is a body politic, of all others most high and worthy, out of whose person no estate of inheritance or freehold can pass or be removed without matter of record. (c)

11. A tenant in tail might also, by the common law, *alienate* his estate *by other modes* of conveyance, which only transferred the possession, not the right of possession. These alienations by innocent assurances did not become *ipso facto* void by the death of the tenant in tail; but must have been *avoided by the entry* of the issue. Thus, if a tenant in tail *exchanged* his estate with a tenant in fee simple, it would be good, till avoided by the entry of the issue in tail. (d)

12. But by the Stat. 3 & 4 Will. 4, c. 74, s. 2, 14, fines, recoveries, and warranties of land, are abolished from the 31st December, 1833; and by the statute of limitations, ib. c. 27, s. 39, it is enacted, "That no *discontinuance*<sup>1</sup> or warranty which

(a) Co. Lit. 325. a. b. 2 Burr. 704.

(b) Co. Lit. 327. b. Lit. s. 599. Doe v. Finch, 4 Bar. & Adol. 283. Doe v. Jones, 1 Cr. & Jer. 528. Driver v. Hussey, 1 H. Bl. 269. Doe v. Jones, 1 B. & Cr. 238, 243.

(c) Co. Lit. s. 625. 335. a. Walsingham's case. Plowd. 552, 562. See also 3 & 4 Will. 4, c. 74, s. 18.

(d) Seymour's case. Tit. 35. c. 12. 2 Ld. Raym. 779, 782. 7 T. R. 278. 1 Inst. 51. a.

<sup>1</sup> So, in *Massachusetts*, by Rev. Stat. ch. 101, § 5. And in *Maine*, Rev. St. 1840, ch. 145, § 8. It seems that in all the United States, where entails are either expressly



may happen or be made after that day, shall defeat any right of entry or action for the recovery of land." It is conceived, therefore, that no discontinuance, according to its strict legal import, can be effected after the period specified in the above acts; for whatever may be the form of discontinuance, the above statute takes away its effect. By the tenth section of the latter act it is enacted, "That a mere entry shall not be deemed possession within the meaning of the act."†

\*13. Where, at the common law, the tenant in tail \* 80 aliened the fee by *any form of conveyance, other than a valid common recovery*, his alienee had *prima facie* only an estate of inheritance, descendible to his heirs as long as the tenant in tail had issue inheritable under the entail, which was called a *base or qualified fee*. Where this alienation was by what was termed an innocent conveyance, the estate of the alienee, upon the death of the tenant in tail, could be avoided by the entry of the issue in tail; where the alienation was made by feoffment, without fine, or by fine without proclamations or recovery not duly suffered, the issue were put to their action in order to avoid the fine. Where, however, a fine was duly levied with proclamations by the tenant in tail, both the entry and action of the issue were taken away. Until this base fee was determined, it had all the incidents of an estate in fee simple. (a)

14. The expression *base fee* in the above act, means exclusively that estate in fee simple, into which an estate tail is converted where the issue in tail are barred; but the person claiming estates in remainder are not barred. (b)

15. Before the late statute for abolishing fines and recoveries, where a tenant in tail made a conveyance in fee for a valuable consideration, the Court of Chancery would decree him to make a good title. Mr. Justice *Wright* is reported to have said that the Court would not point out what title the tenant in tail should

(a) (*Whiting v. Whiting*, 4 Conn. R. 179.) Tit. 35. c. 9.

(b) Stat. 3 & 4 Will. 4. c. 74. s. 1.

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abolished, or the tenant is authorized to bar them by a conveyance in fee simple, there can no longer be a discontinuance of the freehold, in the strict sense of that phrase. Stearns on Real Actions, p. 70. See *post*, tit. 29, ch. 1, § 13—15.

[† This statute does not relate to Ireland, except where expressly named, s. 92; and the reader's attention to this important exception is requested in reference to all the notices of the Stat. 3 & 4 Will. 4, c. 74.]

make, but would decree him to make such title as he is capable of doing. (a)

16. By the common law, where a tenant in tail limited an estate to *commence after his own death*, it was *absolutely void*; and he continued to be tenant in tail as before; because there the issue in tail had a right paramount, *per formam donis*.

17. A tenant in tail covenanted to stand seised to the use of himself for life, after to the use of his eldest son, and his heirs. It was resolved that the son should not have the land by this covenant; for when the tenant in tail covenanted to stand seised to the use of himself for life, it was as much as he could lawfully do. The limitation over was void; and he was seised as before. (b)

81 \* 18. A tenant in tail covenanted, in consideration of natural love and affection, to stand seised to the use of himself for life, remainder to his eldest son in tail, &c. The question was, whether the tenant in tail had made any alteration in his estate by this covenant.

Lord Chief Justice Holt delivered the opinion of the Court. He said it had been made a question if tenant in tail bargained and sold, or leased or released, or covenanted to stand seised of lands entailed, to another in fee, whether the estate conveyed determined by the death of the tenant in tail, or continued till the actual entry of the issue in tail. He held that such estate continued till the actual entry of the issue in tail, for these reasons: 1. Because tenant in tail had an estate of inheritance in him; and before the statute *De Donis*, it was held that such estate was a fee simple conditional. Then the statute made no alteration as to the tenant in tail himself, but only made provision that the issue in tail should not be disinherited by the alienation of his ancestor. 2. The tenant in tail had the whole estate in him; therefore there was no reason why he could not divest himself of it, by grant, bargain, and sale, &c., since the power of disposition was incident to the property of every one. 3. It was no prejudice to the issue in tail, therefore no breach of the statute *De Donis*. 4. That in this case the covenant to stand seised did not alter the estate tail, but it still continued. The reason was, that though the tenant in tail might make a conveyance of

(a) *Sutton v. Stone*, 2 Atk. 101. ¶

(b) *Bedingfield's case*, Cro. Eliz. 895. 2 Rep. 52. a. *Blithman's case*, tit. 6. c. 3.

the estate in his lifetime, which should be good and binding, till avoided by the issue; yet any conveyance which he made to commence after his death, should be void; if by possibility it might not take effect during his life.

What was the reason that such estate was void, when it was limited to commence after the death of tenant in tail? It was because it was to commence at a time when the right of the estate, out of which it would issue, was in another person by a title paramount to the conveyance, viz., *per formam doni*. A tenant in tail had an estate out of which he might carve other estates, provided he did it out of the estate in himself, so as to make it rightful in its creation, but otherwise not. For it would be injurious to make good a lease, or other estate, commencing \* upon the right of another, whose title was \*83 paramount to the lease or estate so made. In the principal case, the issue in tail had a title paramount, the title of the remainder, by virtue of the covenant, the very minute the remainder would take effect; that was the only true reason; therefore to make such an estate to take effect upon the possession of the issue, whose title was paramount, would be to make an estate take effect by wrong, the very minute it had its creation. It was, therefore, adjudged, that the remainder was void, and the estate tail not altered, by this covenant. (a)

19. It was, however, laid down in the preceding case, that an estate created by a tenant in tail, which must, or by possibility might, commence in the lifetime of the tenant in tail, was good.

20. The issue in tail is not bound, either at law or in equity, to complete any contract or *agreement made by his ancestor*, \* respecting the estate tail; because the issue claims \*84 *per formam doni*, from the person by whom the estate tail was originally granted, not from his immediate ancestor.† (b)

21. It was formerly held that a covenant by a tenant in tail

(a) *Machell v. Clarke*, 2 Ld. Raym. 778. 7 Mod. 18. 11—19. 2 Eden. R. 357. *Vide tit.* 32. c. 10 & 11. 7 Mod. 26. *Doe v. Rivers*, tit. 5. c. 2.

(b) (*Partridge v. Dorsey*, 3 H. & J. 302.)

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[† By the Stat. 3 & 4 Will. 4, c. 74, s. 40, it is provided that no disposition by a tenant in tail, resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity, under the act, notwithstanding such disposition shall be made or evidenced by deed.]

to levy a fine, upon a valuable consideration, and a decree of the Court of Chancery that he should do so, would bind the issue in tail. This doctrine was, however, soon altered, and it was determined that a court of equity cannot dispense with any of those forms which the law requires to bar estates tail. (a)

22. A tenant in tail made a mortgage, without levying a fine, with a covenant for further assurance, and died. Lord Keeper Bridgeman would not compel the issue to make the assurance good; though the father might have done it by fine or recovery. (b)

23. A tenant in tail entered into articles, concerning his lands, for payment of his debts; but died without doing any act to destroy the estate tail. It was decreed that this argument could not be executed against the heir in tail. (c)

24. A decree was obtained against a tenant in tail, who had contracted for the sale of his estate, and received a great part of the consideration, to compel him to levy a fine, and suffer a recovery. The tenant in tail stood out all process against him, to a contempt, and died. A bill was then brought against his issue to revive the decree against him, which was dismissed. (d)

25. A tenant in tail covenanted to settle a jointure on his wife. In order to perform his covenant, he acknowledged a fine, but died before it was perfected. The Court of Chancery refused to supply this defect against his issue. (e)

26. Where a person is prevented from barring an estate tail by force and management, the Court of Chancery will compel the parties to act as if the recovery had been suffered. (f)

27. If the issue in tail *does any act towards carrying the contract or agreement of his ancestor into execution*, it will then become binding on him; and he will be *compelled in equity to perform it*.

28. Francis Ross having issue, James his legitimate son, 85 \* and \*John a bastard, devised lands to John in tail. James having copyhold lands by descent, James and John agreed to exchange their estates. The agreement being executed, James obtained a decree against John to levy a fine of his estate tail,

(a) 3 Rep. 41. b. 1 P. Wms. 271. 2 Ves. 634. Hill v. Carr, 1 Cha. Ca. 294. Cavendish v. Worsley, Hob. 203. 2 Vent. 350.

(b) Jenkins v. Keymes, 1 Lev. 237.

(c) Herbert v. Tream, 2 Ab. Eq. 28.

(d) Sangon v. Williams, Gilb. R. 164. Weale v. Lower, 2 Vern. 306. 1 P. Wms. 720.

(e) Wharton v. Wharton, 2 Vern. 3.

(f) Luttrell v. Olmuis, tit. 36. c. 11.

and by that means to settle it on James. John died in contempt for not obeying the decree; his issue entered on the copyhold estate, and continued in the enjoyment of it; in consequence of which a bill was filed against him by James, to perform the agreement made by his father. It was said by the Court, that if a tenant in tail agrees to convey, he is bound by that agreement; if he dies without performing it, his issue is not bound to perform it. But if the issue accepts of the agreement, and enters, as in this case, on the lands, it then becomes his own agreement, and will bind him. So decreed against the defendant. (a)

29. The *issue in tail* is not subject to any of the debts or incumbrances of his ancestor. Therefore, if a tenant in tail acknowledges a statute or recognizance, upon which the land entailed is extended, the issue in tail may enter, upon the death of the ancestor, and oust the creditor. (b)

30. Estates tail were not originally liable, in the hands of the issue, to the payment of *debts due* by the ancestor to the crown. But it is enacted by the Statute 33 Hen. 8, c. 39, s. 75, that all manors, lands, tenements, and hereditaments, which shall come or be in the possession of any person or persons to whom the same shall descend, revert, or remain in fee simple, or in fee tail general or special, by, from, or after the death of any of his or their ancestors, whose heir he is; which said ancestor or ancestors was or shall be indebted to the king, or to any person or persons to his use, by judgment, recognizance, obligation, or any other specialty, the debt whereof shall not be paid; then and in such case the same manors, &c., shall be and stand charged and chargeable to and for the payment of the said debt.

31. Upon the construction of this act, it was resolved by the barons of the Exchequer in 41 Eliz., on conference had with Popham, Ch. J., and divers other justices,—1. That before this statute, if tenant in tail became indebted to the king by judgment, recognizance, obligation, or otherwise, and died, the king should not extend the land in the seisin of the issue in tail; for the king was bound by the statute *De Donis*; as it was adjudged \* in Lord Berkeley's case. 2. That if the tenant \* 86 in tail becomes indebted to the king, by the receipt of the king's money, or otherwise, unless it be by judgment, recognizance, obligation, or other specialty, and dies; the land in the

(a) *Ross v. Ross*, 1 Cha. Ca. 171.

(b) Bro. Ab. tit. Recogn. pl. 7. Tit. 14.

seisin of the issue in tail shall not be extended for such debt of the king's. For this statute extends only to the said four cases; and all other debts remain at common law. 3. That if tenant in tail becomes indebted to the king by one of the four ways above mentioned in the said act, and dies; and, before any process or extent, the issue in tail, *bonâ fide*, aliens the land, it shall not be extended by force of the said act. For, as it appears by the words thereof, it makes the land, in the possession or seisin of the heir in tail only, liable against the issue in tail, and not the alienee. For the makers of the act had reason to favor the purchaser, farmer, &c., of the heir in tail, more than the heir himself; because they are strangers to the debts of the tenant in tail, and came to the land *bonâ fide*, on good consideration. 4. That a debt originally due to a subject, to which the king becomes entitled by attainder, forfeiture, gift of the party, or any other collateral way, was not within the statute; which only extended to debts originally due to the king, by judgment, recognizance, obligation, or other specialty. (a)

32. Where a person takes an estate tail by gift from his ancestor, on good consideration, such estate is not liable to a debt of the ancestor, contracted after the gift was made.

33. Foskew being seised in fee of the manor of S, in consideration of his son's marriage, covenanted to levy a fine of the said manor to the use of himself and his wife for their lives, remainder to the use of his son and his wife, and the heirs of their bodies. A fine was levied accordingly. Foskew afterwards acknowledged a recognizance to Queen Elizabeth, and died indebted to the crown. The manor of S was extended for the queen's debt. It was argued by Coke, that the manor was not chargeable by the Stat. 33 Hen. 8. For the object of that statute was to make lands entailed liable to the king's debts, where they were not so before, against the issue. But the words, "was or shall be indebted," should not be intended after the gift made:—That, "shall be," was to be intended of future debts, after the statute; whereas, at the time of the settlement, Foskew was not receiver or other officer to the queen:—That this was not within  
87\* the \*statute; for the words were, by gift of his ancestors. Here the son had not the manor by gift of his

(a) Anderson's case, 7 Rep. 21. *Ante*, c. 1. s. 30. Tit. 1. s. 63.

father, but rather by the statute of uses; and so he was in the *post*, not in the *per*, by his ancestor; for the fine was levied to divers persons, to the uses aforesaid. Nor was the gift a mere gratuity, but in consideration of marriage; and the debt accrued not till after the gift. He admitted that if there had been any fraud in the case, or any purpose in Foskew, when he made the conveyance, to become the king's debtor or officer, it would be within the statute, and the gift had been a mere gratuity. Resolved that the lands should be discharged. (a)

34. One Hawthorn having an office which rendered him an accountant to the crown, became indebted to Queen Elizabeth by obligation. Two years after he covenanted with one Coxhead, in consideration of his son marrying his daughter, to stand seised to the use of himself for life, remainder to the use of Coxhead and his daughter in tail. Hawthorn afterwards accepted another office of account, by reason of which he became indebted to the crown, and committed suicide. The crown having seized his lands, Coxhead petitioned that they might be discharged; to which it was answered, that the lands were subject to what was due to the crown by reason of the first office, which he had before the conveyance, by the Stat. 13 Eliz.; but as to the office which he had accepted after the conveyance, the arrears of that was not a charge upon the lands conveyed. Upon Coxhead's paying the arrears of the first office, he had an *amoveas manus*. (b)

35. In conformity to the principle that a tenant in tail can only alien or charge his estate for his own life, all leases made by tenants in tail might have been avoided after their death, by their issue. But by the Statute 32 Hen. 8, c. 28, tenants in tail are *enabled to make leases* for three lives, or twenty-one years, which shall bind their issue; though not the persons in remainder, or the reversioner.<sup>1</sup> (c)

36. Where a *bankrupt was tenant in tail in possession*, the *commissioners of bankrupts*, under the 21st Jac. 1, c. 19, s. 12, were *enabled to convey the fee simple of the lands*. Where he

(a) Foskew's case, 2 Leon. 90. (b) Coxhead's case, Moo. 126. (c) Tit. 32, c. 5.

<sup>1</sup> In *Maryland*, the tenant in tail may bind his issue by any lease or conveyance whatever, without restriction. *Laidler v. Young*, 2 H. & J. 69. But not by a mere contract to convey. *Partridge v. Dorsey*, 3 H. & J. 302.

was tenant in tail in remainder, expectant on some preceding estate, the commissioners only acquired a base fee, determinable on failure of issue of the bankrupt. For the statute only enabled the commissioners to make such a title as the bankrupt himself might have made. [And it has been decided that even under a joint commission issued against tenant for life in possession, and tenant in tail in remainder, the bargain and sale of the commissioners passed no more than the estate for life in possession, and a base fee in remainder.

Thus A being tenant for life, with remainder to B in tail male, with remainder over, and A and B being partners in trade, became bankrupts. It was held that a bargain and sale  
90\* under \*a joint commission against them, vested in the assignees the life-estate of A, and a base fee determinable on the death of B, and failure of heirs male of his body:] (a)

37. We have seen that conditional fees were liable to *forfeiture for high treason*, as soon as the donee had issue.<sup>1</sup> When the statute *De Donis* was made, it was resolved that lands entailed were not forfeited for treason, beyond the life of the tenant in tail, one of the causes of this statute being to preserve the inheritance in the blood of those to whom the gift was made, notwithstanding any attainder. But this exemption from forfeiture not being agreeable to the rapacious principles of Henry VIII., he had the address to procure a statute, whereby it is enacted, that every person convicted of high treason “shall lose and forfeit all such lands, tenements, and hereditaments, which any such offender or offenders shall have of *any* estate of inheritance, in use or possession, by any right, title, or means, &c., at the time of any such high treason committed, or any time after.” Saving to every person and persons, their heirs and successors, (other than the offenders in any treason, their heirs and successors,) all such rights, titles, &c., which they shall have, at the day of the committing such treasons, or at any time afore. (b)

38. The Statute 26 Hen. 8, does not extend to attainders

(a) Fearn's Op. 83. *Pye v. Daubuz*, 3 Bro. R. 595. *Jervis v. Tayleur*, 3 B. & Ald. 557.

(b) (Ante, ch. 1, s. 5.) 1 Inst. 392. b. Plowd. 237. Vin. Ab. Forfeit. C. pl. 4. Stat. 26 Hen. 8, c. 13.

<sup>1</sup> See, as to forfeitures in the United States, *ante*, tit. 1, § 67, note.



by Parliament, or where the party stood mute. But by the Statute 33 Hen. 8, c. 20, estates tail are forfeited by all manner of attainders of treason. And the actual possession of the lands is also transferred and vested in the crown presently by the attainer. (a)

39. By the Statute 34 & 35 Henry 8, c. 20, estates tail of the gift of the crown were protected from forfeiture for treason. But by the Stat. 5 & 6 Ed. 6, the former statute is repealed, as to estates tail of the gift of the crown, which are again made forfeitable for treason.

40. Lord Coke has stated the effect of these statutes in the following words:—"If tenant in tail in possession, or that hath a right of entry, be attainted of high treason, the estate tail is barred, and the land is forfeited to the king." It has, however, been determined, that where a tenant in tail, with remainder to a subject, discontinues his estate before his attainer, his issue, having only a right of action, is not affected by it. But \*where the immediate reversion is in the crown, the \*91 tenant in tail cannot create a discontinuance; so that a right of entry remains in the issue, which is forfeited by the attainer. (b)

41. By the attainer for high treason of a tenant in tail in possession, the estate tail becomes forfeited to the crown, during the life of the tenant in tail, by the enacting part of this statute; and, in consequence of the exception in the saving clause, it also remains in the crown during the existence of the heirs of the body of the tenant in tail, and of all such of his collateral heirs as would have been inheritable to the estate tail, if there had been no attainer.

42. But neither the estates in remainder, nor the reversion, are forfeited by the attainer of the person having the preceding estate tail; therefore, if a tenant in tail, with a remainder over, or reversion in another person, is attainted of high treason, the crown will thereby only acquire a base fee, as long as there are heirs of the person attainted capable of inheriting the estate tail, if there had been no attainer; and upon failure of such heirs, the remainder-man or reversioner will become entitled, as being

(a) Downtie's case, 3 Rep. 10. b.

(b) 1 Inst. 372. b. Hawk. P. C. B. 2. c. 49. 3 Rep. 2. b. Cro. Car. 428.

within the words of the saving. But where the reversion is in the crown, all will be forfeited.

43. The Statute 26 Hen. 8, only extends to cases of high treason; therefore as to *felonies*, the statute *De Donis* still remains in force; so that, by attainder of *felony*, *estates tail* are *only forfeited during the life of the tenant in tail*; the inheritance being by the latter statute preserved to the issue. And Lord Coke says, if tenant in tail of lands holden of the king be attainted of felony, and the king, after office, seizeth the same, the estate tail is in abeyance.<sup>1</sup> (a)

( 44. The residue of this chapter is omitted, the entire subject being regulated by legislation in the respective States of the Union. In some of these States, fees tail are expressly turned into and made fees simple absolute in the donee in tail. Such is the case in *Connecticut*, *New York*, *Virginia*, *North Carolina*, *Georgia*, *Kentucky*, *Tennessee*, *Indiana*, and *Michigan*.<sup>2</sup> And such seems to be the effect of the statutes of *South Carolina*, and of an article in the Declaration of Rights in the constitution of *Texas*.<sup>3</sup> Such also is the case in *Mississippi*, and in *Alabama*; but conveyances in those States are expressly permitted to be made to a succession of donees then living, and to the heirs of the body of the remainder-man, and on failure of these, to the right heirs of the donor.<sup>4</sup> In the States of *New Jersey* and *Missouri*, the donee in tail takes only a life-estate, with remainder to the issue as tenants in common, in fee simple absolute.<sup>5</sup> In *Illinois*, *Vermont*, and *Arkansas*, also, the donee

(a) 1 Inst. 392. b. *Id.* 345. a.

<sup>1</sup> Forfeitures of estates, in possession or in action, for crimes, are scarcely known in American law; 5 Dane's Abr. p. 3, 11; 4 Kent, Comm. p. 427; Ante, tit. 1, § 67, note.

<sup>2</sup> *Connecticut*, Rev. St. 1838, p. 389, § 4; *New York*, Rev. St. 1846, Vol. II. p. 9, § 3; [Van Rensselaer v. Kearney, 11 How. U. S. 297;] *Virginia*, Tate's Digest, p. 201; *North Carolina*, Rev. St. 1836, ch. 43, § 1, Vol. I. p. 258; *Georgia*, Prince's Digest, p. 246, 247; *Kentucky*, Rev. St. 1834, Vol. I. p. 442, § 10; *Tennessee*, Carruthers and Nicholson's Digest, p. 279; *Indiana*, Rev. St. 1843, p. 424, § 1; *Michigan*, Rev. St. 1838, p. 258, § 3.

<sup>3</sup> *S. Carolina*, Statutes at Large, Vol. II. p. 415, § 10; *Idem*, Vol. III. p. 341, § 1; 4 Griffith's Law Reg. p. 852, n.; *Texas*, Constitution, tit. Declaration of Rights, art. 17.

<sup>4</sup> *Mississippi*, Howard and Hutchinson's Digest, ch. 34, § 24, p. 348; *Alabama*, Toulmin's Digest, p. 247, § 10.

<sup>5</sup> *New Jersey*, Elmer's Digest, p. 180, § 6; *Missouri*, Rev. St. 1845, ch. 32, § 5. And see *Den v. Fox*, 5 Halst. 39.

takes an estate for life, with remainder in fee simple to him who would first take, per *formam doni*, on the decease of the first tenant in tail.<sup>1</sup> In *Ohio*, the law seems in effect the same, it being enacted that all estates tail shall become fees simple in the issue of the first donee in tail.<sup>2</sup> In the States of *Maine*, *New Hampshire*, *Massachusetts*, *Rhode Island*, *Delaware*, *Pennsylvania*, and *Maryland*, estates tail are recognized as valid estates; but the tenant in tail is enabled to bar them by a deed of conveyance in fee simple.<sup>3</sup> In *Rhode Island*, such estates may also be barred by devise in fee simple, by the tenant in tail.<sup>4</sup>)

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<sup>1</sup> *Illinois*, Rev. St. 1833, p. 131, § 6; *Vermont*, Rev. St. 1839, ch. 59, § 1; *Arkansas*, Rev. St. 1837, ch. 31, § 5, p. 189.

<sup>2</sup> *Ohio*, Rev. St. 1841, ch. 44.

<sup>3</sup> *Maine*, Rev. St. 1840, ch. 91, § 6; *N. Hamp.*, Rev. St. 1842, ch. 129, § 1; *Massachusetts*, Rev. St. 1836, ch. 59, § 3; *Soule v. Soule*, 5 Mass. 61, 65; *Delaware*, Rev. St. 1829, p. 197; *Maryland*, Statutes, Vol. I. p. 181, § 2, (Dorsey's ed.) *Pennsylvania*, Purdon's Digest, p. 353; and see *Laidler v. Young*, 2 H. & J. 69; *Nightingale v. Burrell*, 15 Pick. 104; *Ridgely v. McLaughlin*, 3 H. & McHen. 220.

<sup>4</sup> *Rhode Island*, Rev. St. 1844, p. 261; [*Weld v. Williams*, 13 Met. 486, 491; *Maslin v. Thomas*, 8 Gill, (Md.) 18. A deed by a tenant in tail, made to bar the entail, though not recorded until after the tenant's death, operates, when recorded, from its delivery, like any other conveyance. *Terry v. Briggs*, 12 Met. 17.]

[Whether estates tail are divisible in *Pennsylvania* by deed of partition between the parties interested, so as to bar the entail, argued but not decided. *Tilman v. Roland*, 15 Penn. (3 Harris,) 429.]

## TITLE III.

## ESTATE FOR LIFE.

## BOOKS OF REFERENCE UNDER THIS TITLE.

LITTLETON's Tenures, § 56, 57.

COKE upon LITTLETON, 41—43.

BLACKSTONE's COMMENTARIES. Book II. ch. 8.

ANDREW BISSETT. On the Law of Estate for Life.

OWEN FLINTOFF. On the Law of Real Property. Vol. II. Book I. ch. 3.

KENT's COMMENTARIES. Lect. 55.

LOMAX's Digest. Vol. I. tit. 3.

## CHAP. I.

## NATURE OF AN ESTATE FOR LIFE, AND ITS INCIDENTS.

## CHAP. II.

## WASTE BY TENANTS FOR LIFE.

## CHAP. I.

## NATURE OF AN ESTATE FOR LIFE, AND ITS INCIDENTS.

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| <p>SECT. 1. <i>Description of.</i></p> <p>2. <i>How created.</i></p> <p>9. <i>Held of the Grantor.</i></p> <p>10. <i>Not Entailable.</i></p> <p>14. <i>Subject to Merger.</i></p> <p>16. <i>Tenants for Life entitled to Estovers.</i></p> <p>21. <i>And to Emblements.</i></p> <p>26. <i>May pray in Aid.</i></p> <p>27. <i>Not bound to pay off Incumbrances.</i></p> <p>28. <i>But must keep down the Interest.</i></p> | <p>SECT. 29. <i>When they may keep the Title Deeds.</i></p> <p>32. <i>May alien their Estates. And when constructive Trustees, may convey the whole Fee.</i></p> <p>33. <i>What Act amounts to a Forfeiture.</i></p> <p>43. <i>General Occupancy.</i></p> <p>45. <i>Estates pour auter vie vest in Executors.</i></p> <p>48. <i>Special Occupancy.</i></p> <p>55. <i>Ecclesiastical Persons are quasi Tenants for Life.</i></p> |
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SECTION 1. An estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some par-

ticular person or persons ; or to the happening or not happening of some *uncertain event*.<sup>1</sup> It is in most respects similar to the *ususfructus* of the civil law, which is thus defined in Justinian's Institutes :—*Ususfructus est jus alienis rebus utendi fruendi, salvâ rerum substantiâ*. For the tenant for life has a right to the possession, and annual produce of the land, during the continuance of his estate ; \*without having the *proprietas*, \*102 that is, the absolute property and inheritance of the land itself, which is vested in some other person.<sup>2</sup> (a)

2. Estates for life are of *two sorts* ; either expressly created by deed, or some other *legal assurance* ; or deriving their existence from the *operation of some principle of law*.<sup>3</sup>

3. The first of these, which forms the subject of the present title, arises where lands are conveyed to a man for the terms of *his own life*, or that of any *other person*, or for *more lives* than one ; in all which cases he is called tenant for life, except where he holds for the life of another, when he is called tenant *pour auter vie*. And where a person, having an estate for his or her own life, either by express limitation, or by the operation of some principle of law, grants it over, the grantee becomes the tenant *pour auter vie*.

4. If lands are conveyed to a person for his own life, and that of A and B, the grantee has an estate of freehold, determinable on his own death and the deaths of A and B ; nor can there be any merger of the freehold during the lives of A and B into the estate which the lessee has for his own life ; because, though an estate for a man's own life is greater than an estate for the life

(a) Lib. 2. tit. 4.

<sup>1</sup> *Ad tempus indeterminatum, absque aliqua certa temporis præfinitione.* Bracton, lib. 4, c. 28, fol. 207 ; Co. Lit. 42, a.

<sup>2</sup> [At common law the husband has a life-estate in lands of which his wife owns the fee. The usufruct is his and is an estate in the land which may be taken in execution for his debts. *Eldridge v. Preble*, 34 Maine, (4 Red.) 151 ; *Dejarnatte v. Allen*, 5 Gratt. 499. A devise from a husband to a wife, in lieu and bar of dower, of the "use and improvement" of one third of all the testator's real estate, gives to the widow a life-estate therein. *Fay v. Fay*, 1 Cush. 95. A reversioner with the assent of the tenant for life, built on the estate a house and occupied it. A subsequent conveyance thereof was held not to give the grantee a right to enter and occupy the house against the tenant for life. *Cooper v. Adams*, 6 Cush. 87. A tenant for life may have a proceeding for damages done to his estate by a railroad, without joining the remainder-man. *Railroad v. Boyer*, 13 Penn. State R. (1 Harris,) 497 ; *Staples*, Ex parte, 9 Eng. Law & Eq. Rep. 186.]

<sup>3</sup> [*Stewart v. Clark*, 13 Met. 79.]

of any other person, yet here the lessee has not two distinct estates in him, but only one freehold, circumscribed with that limitation as the measure of its continuance. (a)

5. By the statute 19 Charles II. c. 6, s. 2, it is enacted, that if the persons for whose lives estates are granted, shall remain abroad, (or elsewhere absent themselves within the realm, by the space of seven years together,) and no sufficient proof be made that they are alive, in any action commenced for the recovery of the lands by the lessors or reversioners, the judge shall direct the jury to give their verdict as if the person so remaining abroad were dead. And it has been held that a remainder-man is within this statute. (b)

6. The estates for life mentioned in the preceding sections, will generally endure as long as the life or lives for which they are granted. But there are some estates for life which may *determine upon future contingencies before the death* of the person to whom they are granted.

7. Thus if an estate be given to a woman, *dum sola fuerit*, or *durante viduitate*, or to a man and a woman during coverture, or as long as the grantee shall dwell in a particular house ; 103 \* in all \* these cases the grantees have estates for life, determinable upon the happening of these events.<sup>1</sup> (c)

8. If a manor, generally worth £10 a year, be granted to a person till he has received out of it £100, this will give him an estate for life ; for as the profits are uncertain, and may rise and fall, no precise time can be fixed for the determination of the estate.

9. Tenants for life *hold of the grantors* by fealty, and such other reservations as are contained in the deed by which the estate is created. Where there is no reservation, they hold by fealty only ; this estate not being comprehended within the provisions of the statute *Quia Emptores*. (d)

10. An estate for life is *not capable of being entailed* under the statute *De Donis* ; for all estates tail must be estates of in-

(a) 1 Inst. 41. b.

(b) *Holman v. Exton*, Carth. 246. Vide stat. 6 Ann. c. 18. 2 Cox, R. 373.

(c) 1 Inst. 42. a.

(d) Lit. s. 132. Dissert. c. 2.

[<sup>1</sup> An estate *durante viduitate*, is of a freehold in the widow and in any one to whom she may convey the land ; and if her grantee dies intestate, and the administrator conveys the estate to another, the latter thereby takes an estate of freehold. *Roseboom v. Van Vechten*, 5 Denio, 414.]

heritance. Therefore, where an estate for life or lives is limited to a person and the heirs of his body, the latter words only operate as a description of the persons who shall take as special occupants during the life or lives for which the estate is held; and the grantee takes the absolute property, which he may dispose of by deed. (a)

11. (Mr. Yates, in 1703, being entitled to lands under a lease for three lives, in consideration of a marriage between Frances Yates, his daughter, and Sir Francis Mannock, conveyed the premises by indentures of lease and release to trustees and their heirs, during the said lives, in trust for himself during his life; remainder to his own wife to secure £60; remainder to his daughter for life; remainder to Sir Francis Mannock, the intended husband, for life; remainder to his first and other sons successively in tail male; remainder to his daughters as tenants in common; remainder in trust for his own right heirs. On the marriage of William Mannock, their eldest son, with the sister of the plaintiff, in 1734,) by an indenture reciting the last settlement, and that Sir Francis had obtained a new lease for the lives of himself and his wife and their said son William, it was declared and agreed that certain trustees should be seised of the leasehold premises in trust for Dame Frances, for her life; remainder to Sir Francis, for life; remainder to the said William, for life; remainder to his first and other sons in tail male, with remainders over. Afterwards, on the death of Sir Francis, a new lease was obtained for the lives of Dame Frances, Sir William and his sister; and, subsequently, in 1760, by indenture reciting the settlement of 1734, and that Sir W. M. was seised of the said leasehold premises of and in an estate of descendible freehold, he covenanted to levy a fine *sur concessit* of the said premises, to the use of himself, his heirs and assigns. A fine was levied accordingly; and Sir W. M. surrendered the old lease, and took a new one (for fresh lives,) which he devised to trustees in trust to sell. A contract for sale having been entered into, the bill was filed for a specific performance.

Lord Northington, C., said,—“This is a descendible freehold, not entailable within the statute *De Donis*, and therefore no common recovery could be suffered of it; but the person who

(a) Tit. 2. c. 1. s. 24. *Low v. Burron*, 3 P. Will. 262. *Ex parte Sterne*, 6 Ves. 158. *Mogg v. Mogg*, 1 Mer. 654.

would have been tenant in tail, had it been an inheritance, is entitled to the \*absolute ownership. It is like the case at common law of a conditional fee, which became absolute by the party's having issue." It was decreed that the contract should be carried into execution. (a)

12. R. Blake devised a lease for three lives to trustees, in trust for his son R. Blake, and the heirs male of his body; and in case he should die without issue, then for the plaintiff, his other son, in like manner. R. Blake, the son, surrendered the old lease, and took a new one for three lives, to him and his heirs. R. Blake, the son, died without issue, having by his will disposed of the lease. A bill was filed by his second son to have the benefit of the new lease; insisting that the surrender of the old lease, and the taking of the new one, were not sufficient to bar the limitation to the second son; and that those claiming under R. Blake, the son, ought to be declared trustees of the new lease for the plaintiff.

The Court of Exchequer was of opinion that R. Blake, the son, being tenant in tail,† a court of equity could not have called upon him to have declared such a trust in his lifetime; that there was no stronger equity against his representatives; and dismissed the bill. (b)

13. This doctrine was fully confirmed by Lord Kenyon, who also inclined to the opinion, that a person having an estate of this kind might dispose of it by will. But Lord Redesdale has said he could find no decision that at all warranted Lord K.'s dictum. That he found from his note of the case of *Blake v. Blake*, that though the estate was devised, the argument did not turn on the will, nobody conceiving that the estate would pass by it if the *quasi* estate tail subsisted at the death of the testator. (c)

14. An estate for life is *subject to merge in the inheritance*; therefore, whenever the tenant for life acquires the absolute

(a) *Grey v. Mannock*, 2 Eden's R. 339.

(b) *Blake v. Blake*, cited 3 P. Will. 10. S. C. 1 Cox's Rep. 266. *Blake v. Luxton*, Cooper's Rep. 178.

(c) *Doe v. Luxton*, 6 Term R. 291. *Campbell v. Sandys*, 1 Scho. and Lef. 294. *Dillon v. Dillon*, 1 Ball and Be. 77. 2 Eden's R. 341. n.

[† This must be a mistake; he was *quasi* tenant in tail. — Note by Mr. Cruise.]



property or inheritance of the lands, his estate becomes merged or drowned in the fee simple. (a)

15. An estate *pour auter vie* will also merge in an estate for a man's own life, the latter being [to him] the more valuable [and in legal contemplation the greater estate.] Thus, if an estate be limited to a person for the life of another, remainder to himself for his own life, the first estate is merged. (b)

16. Every tenant for life is *entitled to estovers*; that is, to allowance of necessary wood, which he may take upon the land, \* without any assignment, unless restrained by \*105 special covenants; for *modus et conventio vincunt legem*; but affirmative covenants do not restrain. (c)

17. Spelman says, the word *estovers*, *estoverium*, is derived from the French word *estoffe*, material; it is used in this sense in the statute Westm. 2, c. 25, which gives an assize of novel disseisin *de estoveriis bosci*. It is called *botes* in the Saxon language, and is divided into three sorts; house bote, which is twofold, *estoverium ardendi*<sup>1</sup> *et ædificandi*; plough bote, *estoverium arandi*; and, lastly, hay bote, *estoverium claudendi*. (d)

18. It was resolved in 28 Hen. VIII. that where a lessor covenanted with a lessee that he should have thorns for hedges, by the assignment of the lessor's bailiff, the lessee might cut thorns without assignment, for what the law gives by implication in the lease, that he may take without assignment; otherwise where the lessee covenants negatively, that he will not take without assignment. (e)

19. Tenants for life may cut down *timber trees*, at seasonable times, for the reparation of houses or fences; but a tenant for life cannot cut down timber to build new houses, or to repair those that he himself has improperly suffered to fall into decay.

(a) 1 Inst. 338. b. See tit. 39.

(b) Dyer 10. b. 11 Rep. 83. b. See tit. 39.

(c) 1 Inst. 41. b.

(d) Gloss. 1 Inst. 41. b. 13 Rep. 63.

(e) Dyer 19. b. Hob. 173.

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<sup>1</sup> Tenant for life may not cut two years' fuel in one and the same year, but must take it year by year; nor may he take fuel from one farm or estate to burn on another, with which it has no connection. *White v. Cutler*, 17 Pick. 248; *Fuller v. Watson*, 7 N. Hamp. 341. Neither may he sell the timber to purchase fuel. *Padelford v. Padelford*, 7 Pick. 152; *Richardson v. York*, 2 Shepl. 216. But in *New Hampshire*, a doweress is permitted to take fuel to burn at her dwelling-house, though it be not on the land. Rev. Stat. 1842, ch. 165, § 7. Whether the statute of *Maine* gives so large a license, *quære*. *Maine Rev. St. ch. 95, § 16.*

And where he cuts down more timber than is necessary, it is waste, though he asserts that he cut it down to employ it in future reparations.<sup>1</sup> (a)

20. In an action of waste, for cutting down three hundred oaks, the defendant, as to two hundred of them, pleaded that the houses let to him were ruinous, &c., and that he cut them down to repair those houses; as to the residue, that he cut them down, and kept them to be used in reparations, *tempore opportuno*, &c.

The plaintiff demurred in law; but the Court held it no plea; for if it should, every farmer might cut down all the trees growing on the land, when there was not any necessity of reparations. As to waste by tenants for life, it will be treated of in the next chapter. (b)

21. Where a tenant for life dies before harvest time, his executors will be entitled to the crops then growing on the lands, as a return for the labor and expense of tilling and sowing the ground; which the law calls emblements.<sup>2</sup> (c)

(a) 1 Inst. 53 b. 54 b. Vin. Ab. Waste, M.

(b) *Gorges v. Stanfield*, Cro. Eliz. 593.

(c) (*Stewart v. Doughty*, 9 Johns. 111, 112. 4 Kent. Comm. 109, 110.)

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<sup>1</sup> In *trespass on the case*, where the tenant hired one to repair the fences with boards and stakes, and to furnish those materials, in payment for which he permitted the person to cut down and take trees for fuel, to the value, it was held waste. *Elliot v. Smith*, 2 N. Hamp. R. 430. But in an *action of waste*, in which the plaintiff claimed a forfeiture, it was held, that if the cutting was originally for the purpose of repairs, and the timber was afterwards sold, or exchanged for more suitable materials, and the proceeds were *bonâ fide* applied to that purpose, it was not waste. *Loomis v. Wilbur*, 5 Mason, R. 13, per Story, J. But see *Simmons v. Norton*, 7 Bing, 640, where the contrary was held by Taunton, J. [The tenant for life may cut timber for mining purposes in working coal mines already opened. *Neel v. Neel*, 19 Penn. (7 Harris,) 323. See, also, *Crockett v. Crockett*, 2 Ohio, N. S. 180.]

<sup>2</sup> The right to emblements does not give a right to the exclusive possession of all the lands, but only the right of ingress and egress so far as is needful for due attention to the crops. *Humphries v. Humphries*, 3 Ired. 362. Yet if the landlord, after the tenant who is entitled to a way-going crop has left the premises, does an injury to the crop, the tenant may maintain trespass *quare clausum fregit* against him. *Forsyth v. Price*, 8 Watts, 282.

The character of growing crops, and the respective rights of landlords, tenants and creditors thereto, in the several States of the Union, are in many cases regulated by statutes. See *ante*, tit. 1, § 9, note.

A growing crop passes by a grant of the reversion. *Burnside v. Weightman*, 9 Watts, 46; but if the landlord has agreed that the crop shall at all events belong to the tenant, the grantee of the reversion, with notice of the agreement, is bound by it, and may

22. This rule extends to every case in which the estate for life determines by the act of God, or the act of law; but not where \*it is determined by the act of the tenant.<sup>1</sup> Thus, \*106 if a woman who holds lands, *durante viduitate*, which is an estate for life, sows them, and afterwards marries, she will not be entitled to emblements, because her estate determined by her own act. (a)

23. If an estate be made to a husband and wife during coverture, and the husband sows the land, and afterwards they are divorced, *causâ præcontractus*, the husband will be entitled to emblements. For although the suit is the act of the party, yet the sentence which dissolves the marriage, is the judgment of the law; *et judicium redditur in invitum*. (b)

24. If, however, a person seised in fee of land sows it with grain, and after grants it to one for life, remainder over to another, and the first grantee dies before severance, the person in remainder shall have the corn, and not the executors of the first grantee; for the reason of industry and charge is wanting. (c)<sup>2</sup>

25. The word *emblements* only extends to such vegetables as yield an *annual profit*; so that if a person who is tenant for life plants fruit trees, or oaks, ashes, or elms, &c., or sows the ground with acorns, his executors will not be entitled to them. But if a

(a) (*Debow v. Colfax*, 5 Halst. 128. *Hunt v. Watkins*, 1 Humphr. 498.) *Oland's case*, 5 Rep. 116.

(b) *Oland's case*, 5 Rep. 116. (*Gould v. Webster*, 1 Tyl. 409.) (c) *Hob. 132*.

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not hinder the tenant from entering to gather the crop. *Davis v. Brocklebank*, 9 New Hamp. 73. And see *Cassilly v. Rhodes*, 12 Ohio R. 88; *Adams v. Tanner*, 5 Ala. R. 740; *Grantham v. Hawley*, *Hob. 132*. See further, as to emblements, post, tit. 8, ch. 2, § 19, notes.

<sup>1</sup> The doctrine of emblements is held not to apply against the State; and therefore the purchaser of lands directly from the United States, has been adjudged to be entitled to the crops then growing upon the land. *Boyer v. Williams*, 5 Mis. R. 305. And see *Razor v. Qualls*, 4 Blackf. 286.

If the tenant for life prepares the ground for sowing, and dies before it is actually sown, after which it is sown by the remainder-man; it is said that the representatives of the tenant are entitled to the expenses of preparing the ground. *Gee v. Young*, 1 Hayw. 17. But see *Stewart v. Doughty*, 9 Johns. 111, 112; [*Price v. Pickett*, 21 Ala. 471.]

<sup>2</sup> Lands already sown and planted were conveyed in trust for husband and wife, and the survivor of them, and then the husband died. It was held that the crops survived to the wife, and did not go to the husband's representative; but that if the husband had sown the ground, it had been otherwise. *Haslett v. Glenn*, 7 H. & J. 17.

tenant for life dies in August, before severance of hops, his executors shall have them, though growing on ancient roots.

This determination was probably on account of the great expense of cultivating the ancient roots. (a)<sup>1</sup>

26. In all real actions, a tenant for life may *pray in aid*, or call for the assistance of the person entitled to the inheritance, to defend his title; because the tenant for life is not generally supposed to have in his custody the evidences necessary to establish the right to the inheritance. (b)

27. A tenant for life is *not subject* to the payment of any *principal sums charged on the inheritance*; therefore where he pays off an *incumbrance* of this kind, he becomes a creditor on the estate for the sum so paid; for otherwise he must be supposed to have paid it for the benefit of the persons entitled to the inheritance; but if a tenant for life does any act which shows an intention of paying off the charge for the benefit of the inheritance, he will not in that case be deemed a creditor. (c)<sup>2</sup>

28. Tenants for life are, however, *bound to keep down the interest* of all incumbrances affecting the inheritance. And it has been lately determined that the rents and profits of an estate for life must be applied, not only in payment of all interest due \* during the possession of the tenant for life, but also of all interest due before the commencement of that estate. (d)<sup>3</sup>

(a) 1 Inst. 55 b. (Craddock v. Riddlesbarger, 2 Dana, 206.) Latham v. Atwood, Cro. Car. 515.

(b) Booth's Real Act. 60.

(c) 1 Bro. R. 208. 218. 1 Ves. jun. 233. tit. 12. c. 3. s. 12.

(d) Tracy v. Hereford, 2 Bro. R. 128. (Tit. 15. c. 4.) Penrhyn v. Hughes, 5 Ves. 99.

<sup>1</sup> But clover, though not perennial, nor yielding a crop the first year, is not within the rule of emblements; notwithstanding the dictum in *Wms. Exrs.* 454; *Evans v. Inglehart*, 6 Gill & Johns. 188. See also 3 N. Hamp. 504. As between tenant for life and remainder-man, the thinnings of fir trees under twenty years of age, belong to the tenant for life. *Pidgely v. Rawley*, 2 Coll. Ch. C. 275.

[<sup>2</sup> The removal of an incumbrance upon an estate by a tenant for life, is held to be for the joint benefit of himself and the reversioner, who is bound to contribute his proportion, and for such contribution will have a lien upon the estate. *Davies v. Myers*, 13 B. Monr. 511.]

<sup>3</sup> But it has been lately held, that where an estate, subject to a charge bearing interest, is limited to several persons in succession as tenants for life, the conclusion to be drawn from the authorities appears to be that each tenant for life is liable only for the interest for his own time; but that to liquidate the arrears during his own time, he must furnish, if necessary, all the rents during the whole of his life. *Caulfield v.*

29. Although every person having a freehold interest has a right to the *custody of the title deeds*; yet Lord Hardwicke has said, it was the common practice for the Court of Chancery to direct the title deeds to be taken from the tenant for life, and deposited in Court, for the security of the persons entitled to the inheritance. (a)

30. In a case where the title deeds of an estate had been sent to a master in chancery for the purpose of showing the title to a part directed to be sold, and the tenant for life, after the sale, had obtained an order that they should be delivered to him; the persons entitled to the inheritance moved the Court of Chancery to discharge that order. Lord Henley refused the motion, observing it was his opinion that the tenant for life should have the deeds, except when brought into Court, under an order for safe custody. (b)

31. It is however laid down in a modern case, that although when title deeds are in the hands of the tenant for life, the Court of Chancery will not take them from him; yet when they are in other hands, the Court will not order them to be delivered to him. In a subsequent case it was said that when the tenant for life was satisfied, and did not care about the deeds, but the remainder-man was not satisfied, the Court would take care of them, and not leave them in the hands of a third person. And in a late case, Lord Eldon directed the title deeds of an estate to be delivered out of Court, upon the application of trustees and tenant for life, on the authority of Lord Henley. (c) †

(a) *Burges v. Mawbey*, 1 Turn. & R. 174. 2 P. Will. 477. 1 Atk. 431.

(b) *Webb v. Lord Lymington*, 1 Eden. 8.

(c) *Hicks v. Hicks*, Dick. 650. *Ford v. Peering*, 1 Ves. jun. 72. *Ante*, s. 30.

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M'Guire, 2 Jones & La Touche, 141. As to the principles on which a court of equity will assume that a tenant for life, being also the owner of a charge on the inheritance, has done his duty in keeping down the interest on the charge, see *Burrell v. E. of Egremont*, 7 Beav. 206. See also *Hinves v. Hinves*, 3 Hare, 609. [It seems that if the profits of property given for life, and then over, are taken for payment of debts, the tenants for life may claim from the remainder-men a contribution, in proportion to their respective interests. *Chesson v. Chesson*, 8 Ired. Eq. 141.]

[† The following observations and references to cases on the subject of the custody of title deeds by tenants for life, may not be unacceptable to the student.

Every tenant for life has *prima facie* a right to hold the title deeds of the estate. *Ford v. Peering*, 1 Ves. jun. 72, 76; *Strode v. Blackbourne*, 3 Ves. 225; *Bowles v. Stewart*, 1 Scho. & Lef. 209, 223. Where, therefore, a father is tenant for life, and his son tenant in tail or in fee, and there are no interests in strangers, the Court of Chan-

108\*      \*32. Every tenant for life has a right to the full use and enjoyment of the land, and of all its annual profits, during the continuance of his estate. He has also the *power of alienating* his whole estate and interest, or of creating out of it any less estate than his own, unless he is restrained by condition. But if a tenant for life attempts to create a greater estate than his own, it must necessarily be void, upon the principle that *nemo dat quod non habet*. If, however, the person entitled to the inheritance is a party to the deed, there the tenant for life may join with him in conveying away the entire inheritance.†

33. Estates for life are still, in some respects, considered as

cery will not, it seems, from the cases next cited, take the title deeds out of the hands of the father. *Pyncent v. Pyncent*, 3 Atk. 570; *Lord Lempster v. Lord Pomfret*, Amb. 154; *Webb v. Lord Lymington*, 1 Eden, 8; *Tourle v. Rand*, 2 Bro. C. C. 652. *Duncombe v. Mayer*, 8 Ves. 320; *Churchill v. Small*, ib. 322; unless there be evidence of spoliation; *Dixies v. Hilary*, Cary, 26, 7 ed. 1820; *Crop v. Norton*, 2 Atk. 74, 76; *Smith v. Cooke*, 3 ib. 378, 381; *Ford v. Peering*, 1 Ves. jun. 72, 78, and see *Papillon v. Voice*, 2 P. Will. 476.

But when the tenant for life is a stranger to the remainder-man whose estate is immediately expectant upon the estate for life, the Court will, on the petition of the remainder-man, without evidence of spoliation, order the deeds for safe custody. *Ivie v. Ivie*, 1 Atk. 430; *Pyncent v. Pyncent*, 3 ib. 571; *Lord Lempster v. Lord Pomfret*, Amb. 154; unless the remainder be remote; *Ivie v. Ivie*, *ubi supra*; *Joy v. Joy*, 2 Eq. Cas. Abr. 284, or contingent; *Ib. and Noel v. Ward*, 1 Mad. 329.

In the case of a jointress or dowress, the Court will, on confirmation of her jointure or dower, order her to deliver up title deeds to the person next entitled to the possession. *Petre v. Petre*, 3 Atk. 511, Sand. ed. (n.); *Tourle v. Rand*, 2 Bro. C. C. 652; *Senhouse v. Earle*, 2 Ves. sen. 450; *Leech v. Trollop*, ib. 662; *Ford v. Peering*, 1 Ves. jun. 76.

With respect to the custody of title deeds as between trustee and cestui que trust, the feoffee to uses before the statute of 27 Hen. 8, c. 10, was entitled to the custody of the deeds, and so it would seem by analogy, and for similar reasons the trustee who has the whole legal fee in him since the statute, is entitled to the custody of the deeds. *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 67, 72; *Happer v. Faulder*, 4 Mad. 129. But upon the application of the cestui que trust, apprehending spoliation, the Court would, upon the authorities before cited, order the deeds for safe custody.] (2 Story, Eq. Jur. § 703, 704. But see tit. 2, ch. 1, § 39, n.)

[† Where an estate has been contracted to be sold, and the vendor dies before the completion of the purchase, having devised the estate in settlement to one for life, or other limited interest, with remainders over, and the specific performance is decreed, the tenant for life, or other limited interest, is empowered by the 1 Will. 4, c. 60, sec. 17, to convey the whole fee or other interest contracted to be sold, or in such manner as the court shall direct; and such conveyance is made as effectual as if the party conveying were seised in fee. The above act, section 18, applies to other constructive trusts as well as in the preceding instance, and also to resulting trusts.]

strict feuds, being *forfeitable* for many of the causes for which feuds were formerly forfeited. Thus, where a tenant for life takes upon him to *convey a greater estate* or interest than that which he has, whereby the estate in remainder or the reversion is \*divested, such conveyance will operate as a \*109 forfeiture of his estate for life; because it is a renunciation of the feudal connection between him and his lord; and the person in remainder or the reversioner may enter for the forfeiture. (a)

34. Alienations of this kind may be either by deed or by matter of record. I. *By deed*, as if a tenant for life makes a *feoffment in fee* to a stranger, it is a forfeiture. So if there be a tenant for life, remainder to another for life, and both join in a feoffment in fee to a stranger, it is a forfeiture of both their estates. (b)

35. If a baron and feme, tenants for life, make a feoffment, this is a forfeiture during the coverture. So where the baron is seised in right of his wife, and the baron and feme make a feoffment. It is the same where the baron alone makes a feoffment. But in all these cases it shall not be any forfeiture against the wife after the death of her husband. (c)

36. There are, however, several modern modes of assurance, which do not divest the estates in remainder or the reversion; and, therefore, have not the effect of creating a forfeiture of an estate for life. (d)<sup>1</sup>

(a) Gilb. Ten. 38. Wright, 203.

(b) 1 Inst. 251. a. Tit. 33. c. 4.

(c) 10 Vin. Ab. 371.

(d) Tit. 32. c. 10.

<sup>1</sup> Thus, if he conveys by a deed of lease and release, or of bargain and sale, or other conveyance operating by the statute of uses, he passes no greater estate than he has in the land, and it is no forfeiture. *Pendleton v. Vandevier*, 1 Wash. 381. [A deed of release and quitclaim in fee, by a tenant for life, is not a forfeiture of the estate for life. *Bell v. Twilight*, 2 Foster, N. H. 500.] In some of the United States it has been held that even a feoffment created no forfeiture. *Rogers v. Moore*, 11 Conn. 553. In others, it is provided by statutes that no deed of a tenant for life or years shall work a forfeiture, or shall operate to pass a greater estate than he could lawfully convey. *Maine*, Rev. St. ch. 91, § 9; *Massachusetts*, Rev. St. ch. 59, § 6; *New Hampshire*, Rev. St. ch. 129, § 6; *Vermont*, Rev. St. ch. 59, § 4; *New York*, Rev. St. 1846, Vol. II. p. 23, § 145; *Kentucky*, St. 1798, Rev. St. Vol. I. p. 110; *Michigan*, Rev. St. 1837, part 2, tit. 1, ch. 1, § 7; *Indiana*, Rev. St. 1843, ch. 28, § 23, 64; *Illinois*, Rev. St. 1833, p. 129, § 1; *Pennsylvania*, Purdon's Dig. 5th ed. p. 251, § 9; *McKee v. Pfout*, 3 Dall. 486; *Virginia*, Tate's Dig. p. 101, § 20; Stat. 1785, ch. 67. See also 4 Kent, Comm. 82—84; *Davis v. Whitesides*, 1 Bibb, R. 512.

37. II. By *matter of record*, as where a tenant for life levies a *fine*, or suffers a *common recovery*, such assurances will generally operate as a forfeiture of his estate; unless the person in remainder or reversion is a party to them. (a)

38. Tenant for life may also forfeit his estate by *disclaiming* to hold of his lord, or by affirming, or impliedly admitting the reversion to be in a stranger, upon the feudal principle, that if the vassal denied the tenure, he forfeited his feud. This denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges it to be in a stranger; for in all these cases he denies that he holds his lands of the lord. But as, by the feudal law, the vassal was to be convicted of this denial; so in the English law those acts which plainly amount to a denial must be done *in a court of record*, to make them a forfeiture, because such act of denial appearing on record, is equivalent to a conviction upon solemn trial. All other denials that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, were by our law rejected; for such convictions might be obtained without any just cause; but the denial of the tenure upon record could never be counterfeited or abused to any injustice. (b)

110 \* 39. If, therefore, a tenant for life be disseised, and bring a *writ of right*, this is a forfeiture of his estate; because by suing that writ he admits the reversion in fee to be in himself, and by consequence denies that he holds over. So it is, if in a writ of right brought against him, he joins the mise on the mere right; for by taking upon himself the privileges of tenant in fee simple, he admits the inheritance to be in himself, which is a denial of the tenure. (c)

40. If a stranger brings an action of waste against a tenant for life, and he *pleads nul wast fait, in bar to the action*, this is a forfeiture; because by this plea he admits the stranger to be a proper person to punish waste, if there be any. (d)

41. If the demandant in a real action recovers against a tenant for life, by default, or *nient dedire*, or by *pleading covetously* to the disherison of the person in reversion, these are forfeitures of

(a) Tit. 35, 36.

(b) Dissert. c. 1. (Jackson v. Vincent, 4 Wend. 633.) Bac. Ab. Est. for Life, C.

(c) 1 Inst. 251. b. See Stat. 3 & 4 Will. 4. c. 27. s. 36, 37, 38.

(d) 1 Inst. 251. b. 252. a. 10 Vin. Ab. 378.



his estate. For the tenant for life is intrusted with the freehold,<sup>1</sup> and is to answer to the *præcipes* of strangers, and defend his own, as well as the reversioner's interest; but when he gives way to the demandant's action, he admits the right of the reversion to be in him, and consequently denies any tenure of his reversioner, which is a forfeiture.

42. Estates for life are also forfeited by attainder of *treason* or *felony*.<sup>2</sup> Lord Hale says, if tenant for life be attainted of treason, the king hath the freehold during the life of the party attainted; and in the case of felony, the profits of the land are forfeited during the life of the tenant for life. (a)

43. By the common law, where [lands were limited to A during the life of B, and A] died during the life of *cestui que vie*, the person who first entered on the land after his death, might lawfully retain the possession thereof, as long as *cestui que vie* lived by right of *occupancy*; because it belonged to nobody, [there not being words of inheritance, it could not go to the heir, and being an estate of freehold, it could not devolve upon the executor.] But where the king had the reversion, no right of occupancy was allowed. For if the king's title and a subject's concur, the king's shall always be preferred; against the crown, therefore, there could be no prior occupant. (b)

44. There could be no [general] *occupancy* of incorporeal hereditaments, such as advowsons, rents, &c., (of which notice will \* be taken hereafter) [inasmuch as they lay in \*111 grant, and were not capable of actual possession.] (c)

45. The right of general occupancy is now taken away by the statute 29 Car. II. c. 3, s. 12, which enacts,—“That any estate *pour auter vie* shall be devisable by will, &c., and if no such devise thereof be made, the same shall be chargeable in the hands of the *heir*, if it shall come to him by reason of a *special occupancy*, as assets by descent, as in case of lands in fee simple. And in case there be no special occupant thereof, it shall go to the exec-

(a) P. C. vol. 1. 251. 2 Inst. 19.

(b) 1 Inst. 41. b. 2 Comm. 259. Geary v. Bearcroft, O. Bridg. 484. (c) Co. Lit. 41. b.

<sup>1</sup> If he suffers the land to be sold for taxes, it is a forfeiture of his estate. M'Millan v. Robbins, 5 Ham. 28.

<sup>2</sup> In the United States, there is no forfeiture for felony; nor is forfeiture for treason recognized except in a few of the States in which it has not been abolished. See ante, tit. 1, § 67, n.

utors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.”

46. By the statute 14 Geo. II. c. 20, s. 9, reciting the statute 29 Car. II. and that doubts had arisen, where no devise had been made of such estates, to whom the surplus, after debts paid, should belong; it is enacted,—“ That such estates *pour auter vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate.”<sup>1</sup>

47. It was held by Lord Eldon in a modern case, that the interest in an estate *pour auter vie* to a man, his executors, administrators, and assigns, beyond the debts, belonged to those who were entitled to the personal estate, [that is, to the residuary legatees, and the executor as special occupant was held a trustee for them; the will was not attested according to the statute of frauds, so that there was no disposition of the estate *pour auter vie*, but there was a general bequest of the residue of the testator’s personal estate.] (a)

48. Where an estate was limited to a man and his heirs, or the heirs of his body, during the life of another person, no general right of occupancy could arise; for the heir or heirs of the body

(a) *Ripley v. Waterworth*, 7 Ves. 425. *Milner v. Lord Harewood*, 18 Ves. 273.

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<sup>1</sup> The provisions of these two statutes of 29 Car. 2, & 14 Geo. 2, have been enacted in several of the United States. See *New Jersey*, Rev. Code, 1820, p. 223; *Elmer’s Dig.* p. 596, § 5; *Virginia*, Henning’s Statutes at Large, Vol. XII. p. 152, § 51; *Tate’s Digest*, p. 520; *North Carolina*, Rev. St. Vol. I. p. 278, § 22; *Kentucky*, Rev. St. 1834, Vol. I. p. 669, § 53; *Indiana*, Rev. St. 1843, ch. 30, art. 1, § 6. In *Maryland*, estates *pour auter vie* are made assets in the hands of the executor or administrator of the tenant, unless expressly limited to him and his heirs only. Statutes of 1798, St. 101, ch. 7, Dorsey’s ed. Vol. I, p. 389. In *New York*, whether limited to heirs, or otherwise, they are freehold estates only during the life of the grantee or devisee; but after his death are deemed chattels real. *N. York*, Rev. St. Vol. II. p. 9, § 6, (3d ed.) In *Maine*, *Massachusetts*, *Rhode Island*, and *Alabama*, these estates are expressly made devisable; and, in the two former States, descendible; *Maine*, Rev. St. ch. 92, § 1; *Massachusetts*, Rev. St. ch. 61, § 1; *Rhode Island*, Rev. St. 1844, p. 231; *Alabama*, *Toulmin’s Dig.* p. 883, § 2. In *Arkansas*, all real estate is expressly made assets in the hands of the executor or administrator for the payment of debts. *Arkansas*, Rev. St. ch. 4, § 145. Other States are not found to have legislated on the subject; but in all cases, where no express provision is made, these estates seem to be regarded as other real estates of a deceased owner, and go in the same course of distribution. See 4 Kent, Comm. p. 26, 27; *Walk. Introd.* p. 275.

of such grantee might, and still may enter, on the death of his ancestor, and hold the possession as *special occupant*; having an exclusive right, by the terms of the original contract, to occupy the lands, during the residue of the estate granted. (a)

49. [It was for a long time considered an unsettled point whether executors or administrators could be special occupants \* of corporeal hereditaments.] It is stated in Roll's \*112 Abridgment, from a case in Dyer, that if a man leases land to one and his executors for the life of J. S., and grantee dies,<sup>1</sup> the executor shall be special occupant, though it be a frank tenement. In the next paragraph, Roll inserts a case directly contrary.† If a man grants a rent to another, his executors and assigns, for the life of J. S., and after the grantee dies, making an executor, the executor shall not be a special occupant; because it is a frank tenement, which cannot descend to the executor. (b)

50. Lord Hardwicke is reported by Atkins to have cited the first of these cases from Roll, and to have assented to it. Lord Redesdale has expressed strong doubts as to this point; and has justly observed that the title of an executor depends on his taking upon himself the administration of the will; therefore, does not commence *instantly*, but by his subsequent act. As to an administrator, *ex necessitate*, his title cannot commence *instantly*. It should, therefore, seem that the character of special occupant cannot properly belong to either. Lord Redesdale further observes, that on the contrary, Lord Chief Baron Comyn, in his Digest, states the case in Dyer as having decided,<sup>2</sup> that the executor shall not have the land as special occupant; for an occupant has the freehold, which an executor cannot take; and

(a) Doe v. Robinson, 8 Bar. & Cress. 296.

(b) Tit. Occupant, G. pl. 2. Dyer, 328. pl. 10. Buller v. Cheverton, 2 Roll. Ab. 151.

<sup>1</sup> This is an error. In the case in Dyer it is stated that the lessor died within the term, living the *cestui que vie*; and the question was, whether the termor should be special occupant, or tenant by sufferance, paying rent to the executors of his lessor. It appears to be the same with Lord Winslow's case, 3 Leon. 35, which was never decided.

<sup>2</sup> Ch. B. Comyn states that the question was raised in Dyer; but that the point was decided in 2 Bulstr. 11.

[† The first case put by Roll is of a corporeal hereditament (namely) a lease of the land; the second case is the grant of a rent, an incorporeal hereditament, and therefore distinguishable from the former case.]

refers to the second case stated in Roll, as an authority for this point. That that case, which was long subsequent to the case in Dyer, was certainly in conformity to the opinion of Comyn; and according to *Salter v. Butler*, Moo. 664, Cro. Eliz. 901, Yelv. 9; and the law seemed to have been understood by Peer Williams as so settled, though he did not appear satisfied with it. (a)

51. In favor of the proposition that an executor or administrator may take a freehold estate as special occupant, is the following passage in Bacon's Abridgment, supposed to have been written by Lord Chief Baron Gilbert:—"If a lease be made of land to J. S., his executors and assigns, during the life of B., the executors of J. S. shall be the special occupants if he die in the life of B; for though it be a freehold, which in due  
113\* \* course of law would not go to executors, yet they may be designed, by the particular words in the grant, to take as occupants; and such designation will exclude the occupation of any other person; because the parties themselves, who originally had the possession, have filled it up by this appointment." (b) †

52. [The case of *Ripley v. Waterworth* (c) seems to have settled that executors and administrators can take, as special occupants, *corporeal hereditaments*; but, until the recent decision of *Bearpark v. Hutchinson*, (d) the still more doubtful point remained, whether they could in any sense be special occupants of *incorporeal hereditaments*; it being admitted that in strictness there could not be occupancy of any thing which lay in grant.

53. In the latter case a rent charge was limited to A (generally) during the life of B, and upon A's death in B's lifetime, intestate, a question arose whether the rent charge was not thereby determined, or whether it belonged to the administrator of A as assets within the 29 Car. II. c. 3, s. 12. It was contended that that statute applied only to estates *pour autre vie*, of which there could be occupancy at common law, and that, as there could be no occupancy of a rent charge, it had expired.

(a) Vol. 3. 466. Irish Rep. vol. 1. 289. Tit. Estate, F. 1. Vol. 3. 264. note d.

(b) Tit. Estate for Life, 8.

(c) 7 Ves. 425.

(d) 7 Bing. 178.

[† In addition to the above authorities among others may be cited the opinion of Lord Hardwicke in *Westfaling v. Westfaling*, 3 Atk. 460; and in *Williams v. Jekyll*, 2 Ves. S. 681.]

Tindal, C. J., delivered the opinion of the Court of Common Pleas, that although there could not be *general* occupancy of a rent charge, for the reason above mentioned, nor in strictness *special* occupancy; yet, upon the authority of Lord Coke and other early writers, it was said there could be a *quasi* special occupancy; and that, as the statute was remedial, it was the soundest construction of the second branch of the 15th section, to hold that it included not only all such estates *pour auter vie*, as were so in strictness, but also all such as were in common parlance held to be the subject of special occupancy. The Court expressed their opinion, confirmed by the decision of Lord Keeper Harcourt in *Rawlinson v. Duchess of Montague*, and of Lord Chief Justice Willes in his report.] (a)

54. In a modern case it was held by Lord Kenyon and the other judges, that if an estate *pour auter vie* be limited to \* a man, his heirs, executors, administrators, and assigns, \*114 it descends to the heir as a special occupant, in preference to the executors. (b)

55. *Archbishops and bishops* were formerly considered as tenants in fee simple of the lands which they held in right of their churches. As to rectors, parsons, and vicars, Lord Coke says, that for the benefit of the church, and of their successors, they were in some cases esteemed in law to have a fee simple qualified; but to do any thing to the prejudice of their successors, in many cases the law adjudged them to have in effect but an estate for life. Since the several statutes by which all ecclesiastical persons and corporations are restrained from alienation, except by leases for three lives, or twenty-one years, they are generally considered as *quasi tenants for life only*. (c)

56. In consequence of this principle, it is enacted by the statute 28 Hen. VIII. c. 11, s. 6, that in case any incumbent, before his death, hath caused any of his glebe lands to be manured and sown, at his own proper costs and charges, with any corn or grain, that then all the said incumbents may make and declare their testaments of all the profits of the corn growing upon the said glebe lands so manured and sown.

(a) 3 P. W. 264. n. Willes, 505.

(b) *Atkinson v. Baker*, 4 Term R. 229.

(c) 1 Inst. 44. a. Id. 341. u. & b. Lit. S. 648, *infra*, ch. 2. Tit. 32. c. 2. & 5.

## CHAP. II.

## WASTE BY TENANTS FOR LIFE.

SECT. 1. <i>Different Kinds of Waste.</i>	SECT. 42. <i>May be cut down by Order of the Court of Chancery.</i>
2. <i>Felling Timber.</i>	47. <i>Clause, without Impeachment of Waste.</i>
11. <i>Pulling down Houses.</i>	56. <i>How far restrained in Equity.</i>
14. <i>Opening Pits or Mines.</i>	64. <i>Is annexed to the privy of Estate.</i>
18. <i>Changing the Course of Husbandry.</i>	65. <i>Partial Powers to do Waste.</i>
20. <i>Destruction of Heir Looms.</i>	68. <i>Waste by Ecclesiastics.</i>
21. <i>Permissive Waste.</i>	76. <i>Accidents by Fire.</i>
25. <i>Of the Action for Waste.</i>	
34. <i>Waste restrained in Equity.</i>	
35. <i>The Timber belongs to the Person entitled to the Inheritance.</i>	

SECTION 1. Although tenants for life are entitled to reasonable estovers, yet they are prohibited from destroying those things which are not included in the temporary profits of the land; because that would tend to the permanent and lasting loss of the person entitled to the inheritance.<sup>1</sup> This destruction is called *Waste*; and is either *voluntary*, which is a crime of commission, or *permissive*, which is a matter of omission only. *Voluntary waste* chiefly consists,—1. In felling timber trees; 2. In pulling down houses; 3. Opening mines or pits; 4. Changing the course of husbandry; 5. Destroying heir looms. (a)

(a) (*Baxter v. Taylor*, 1 Nev. & M. 18.)

<sup>1</sup> The injury must be material and of substance. Therefore, where waste was alleged in changing the course of husbandry, and the jury found for the plaintiff with only three farthings damages, the defendant was held entitled to judgment; for *de minimis non curat lex*. *Harrow-School v. Alderton*, 2 B. & P. 86. And see *Sheppard v. Sheppard*, 2 Hayw. 382. So Bracton, speaking of the taking of *estovers*, beyond the reasonable measure, says,—*erit vastum injuriosum, nisi vastum ita modicum fuerit, propter quod non sit inquisitio facienda*. Bract. 1, 4, c. 18, § 12, fol. 316, b. And whether the acts done are prejudicial to the inheritance, is for the jury to determine. *Jackson v. Tibbits*, 3 Wend. 341; *Smith v. Sharpe*, Bus. Law, N. C. 91.

2. The first kind of waste consists in *felling*<sup>1</sup> *timber trees*, except for estovers, because they are not deemed part of the annual produce of the land, but belong to the owner of the \*inheritance; therefore the tenant for life has only a \*116 qualified property in them, as far as they afford him shade and shelter, and a right to take the mast and fruit. (a)

3. In the case of leases for lives, where the timber is included, if the lessor fells the trees, the lessee may maintain an action of trespass against him, and will be entitled to recover damages adequate to the loss he sustains; because the lessee has, by his lease, a particular interest in the trees, such as the mast and fruit of them, and shade and shelter for his cattle; and may lop them, if they be not thereby injured. But the property of the body of the trees remains in the lessor, as parcel of his inheritance; who may punish the lessee in an action of waste, if he fells or damages any of them. So that both the lessor and lessee have an interest in the trees; therefore if a stranger cuts them down, each of them shall have an action against him, to recover their respective loss. (b)

4. Where the trees are excepted in the lease, which is usually done, the lessee has no interest whatever in them; and the lessor may have an action of trespass against him, if he either fells or damages them. The lessor has also a power, as incident to the exception, to enter upon the land, in order to fell and take away the trees; though this power, for the greater caution, is often expressly reserved. (c)

5. Timber trees are those which serve for building, or reparation of houses; such as oak, ash, and elm, of the age of twenty years and upwards.<sup>2</sup> But where oak and ash are seasonable

(a) 1 Inst. 53. a. 11 Rep. 48. b.

(b) 11 Rep. 48. a. 1 Saund. 322. n. 5. (Little v. Palister, 3 Greenl. 6.)

(c) Foster v. Spooner, Cro. Eliz. 18. Heydon v. Smith, Godb. 173. Jackson v. Cator, 5 Ves. 688.

<sup>1</sup> It is not waste, if the tenant should cut and carry away trees which have been blown down; the remedy in such case is in trover. Shult v. Barker, 12 S. & R. 272; 1 Hoffm. Course, 211; 11 Rep. 46, a. Liford's case.

<sup>2</sup> The question, what are timber trees, the cutting of which is waste, is not a question of law, but a question of fact, to be determined by the jury. The principle of law is, that the tenant shall not be permitted to do any act of permanent injury to the inheritance, except to take his reasonable estovers; and on this principle the question of waste or no waste, in the cutting of trees, is to be decided by the jury.

wood, and have been usually cut down at certain periods, it was formerly held that it was not waste to cut them down at that time; but I can find no modern decision on this point. (a) <sup>1</sup>

6. By the custom of some countries, certain trees not usually considered as timber, are deemed to be such, being there used for building.

7. [Birch trees are considered timber in Yorkshire and Cumberland.† Beech, cherry, and aspen, in Buckinghamshire.‡ Beech also in Gloucestershire § and Bedfordshire.‖ Beech and 117\* \*willow in Hants.¶ In some places, whitethorn, holly; ††

(a) *Bullen v. Denning*, 5 B. & C. 842, 851. 22 Vin. Ab. 442. (*Smith v. Williams*, Gwill. Tithe Cas. 608.)

Therefore where the land is wild and uncultivated, and covered with timber, the tenant may fell a reasonable portion of it, so as to render the land fit for cultivation; but if he cut down *all* the trees, so as permanently to injure the inheritance, it is waste. *Jackson v. Brownson*, 7 Johns. 227. And see 4 Kent, Comm. 76; *Hickman v. Irvine*, 3 Dana, 123; *Parkins v. Coxe*, 2 Hayw. 339; *Keeler v. Eastman*, 11 Verm. R. 293; *Padelford v. Padelford*, 7 Pick. 152. So, in those States where a widow is dowable of wild lands, she is permitted to clear up a reasonable proportion of them. *Hastings v. Crunckleton*, 3 Yeates, 261; *Findlay v. Smith*, 6 Munf. 134, 148, per Roane, J. And it seems, that she may convert timber into staves and shingles, where such has been the ordinary and is the only beneficial use that she can make of the land. *Ballentine v. Poyner*, 2 Hayw. 110; and may cut down timber for any necessary uses, if enough is left for permanent use, and the estate is not materially injured. *Owen v. Hyde*, 6 Yerg. 334. And generally, where a prudent owner would clear off the timber, and doing so increases the value of the entire premises, it seems, in the United States, not to be held waste in the tenant if he does so. *Givens v. McCalmont*, 4 Watts, 463, per Huston, J.; *Chase v. Hazelton*, 7 N. Hamp. R. 171; *Keeler v. Eastman*, 11 Verm. R. 293. Whether the fact that the cutting of the trees, though not required for estovers, was in truth no injury to the inheritance, nor violation of the rules of good husbandry, is sufficient to absolve the tenant from the charge of waste, provided it were not actually a benefit to the estate, and were an act of disinherison, *quære*; and see *Livingston v. Reynolds*, 26 Wend. 115, 117, 122; *Owen v. Hyde*, 6 Yerg. 334. See *Rector, &c. of Hampton v. Titus*, 1 Allen, N. B. R. 278; [*Crockett v. Crockett*, 2 Ohio, N. S. 180; *Morehouse v. Cotheal*, 2 New Jer. 521; *McCullough v. Irvine*, 13 Penn. State R. (1 Harris,) 438; *People v. Davison*, 4 Barb. Sup. Ct. 109; *Davis v. Gilliam*, 5 Ired. Eq. 308.]

<sup>1</sup> Where oaks or other timber trees are so abundant as to be customarily used for fuel, the tenant may cut them for that purpose. *Padelford v. Padelford*, 7 Pick. 152.

[† *Cumberland's case*, Moore, 812; *Pinder v. Spencer*, Noy, 30.]

[‡ Co. Lit. 53, a; *Anon*, 2 Roll. Rep. 83; *Aubrey v. Fisher*, 10 East, 446; *Wright v. Powle*, Gwill. Tithe Ca. 357; *Bibye v. Huxley*, Bunb. 192.]

[§ *Rex v. Minchin Hampton*, 3 Burr. 1309; *Abbott v. Hicks*, 1 Wood. Tithe Ca. 319; *Welbank v. Hayward*, 3 Wood, 512.]

[‖ *Bibye v. Huxley*, 2 Wood, 237.]

[¶ *Layfield v. Cowper*, 1 Wood, 330; *Guffley v. Pindar*, Hob. 219.]

[†† *Pinder v. Spencer*, Noy, 30; 1 Inst. 53, a. note (10).]



blackthorn;† horsechestnut, lime, yew, walnut, crab, and horn-beam;‡ in other districts, pollards or other timber trees which have been lopped are, contrary to general estimation, also considered timber.§]

8. If a tenant for life tops timber trees, or does any thing else which causes them to decay, it is waste. So if he suffers the young germins or shoots to be destroyed, or stubs them up. (a)

9. Lord Coke says that cutting down willows, birch, beech, asp, maple, or the like, standing in the defence and safeguard of a house, is waste;<sup>1</sup> as also the stubbing up a quickset fence of whitethorn, or suffering it to be destroyed. He also states that cutting dead *wood* is not waste; but that turning of trees to coals for fuel, when there is sufficient dead wood, is waste. [But it seems to be now settled that if a bare tenant for life cuts down decayed *timber*, it is waste.]] (b)<sup>2</sup>

10. All tenants for life have a right to cut down coppices and underwoods, at seasonable times, according to the custom of the country; for no advantage can arise to a tenant for life from woods of this kind, but by the sale of them. It was, however, held, in a modern case, that a tenant for life has no property in the underwood till his estate comes into possession; and cannot have an account of what was cut wrongfully by a preceding tenant.(c) [As to what may be considered underwood, the reader is referred to the *King v. Ferrybridge*, the reporter's note and the cases there cited.] (d)

(a) 1 Inst. 53. a. Dyer, 65. a.

(b) 1 Inst. 53. a.

(c) *Pigot v. Bullock*, 1 Ves. jun. 479.

(d) 1 Barn. & Cress. 375, 379.

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[† *Cook v. Cook*, Cro. Car. 531.]

[‡ *Duke of Chandos v. Talbot*, 2 P. Will. 606; *Walton v. Tryon*, Gwill. 832.]

[§ *Soby v. Molyne*, Plow. 470; *Anon*, Gwill. 165; *Duke of Chandos v. Talbot*, *ubi supra*.]

[|| *Perrot v. Perrot*, 3 Atk. 94; and see *Whitfield v. Bewit*, 2 P. Will. 240; S. C. 3 *Ibid.* 266; see also *Wickham v. Wickham*, 19 Ves. 419.]

<sup>1</sup> But if he cuts down pollard willow trees, leaving the stools or butts, from which they will shoot afresh, it is not waste; provided they are not timber by the custom of the country, and do not serve for shelter or ornament to the house, or to protect the bank of a river, or are not intended as a permanent shade to beasts while depasturing. *Phillips v. Smith*, 14 M. & W. 589.

<sup>2</sup> If the tenant, in the course of good husbandry, removes dead and decaying trees, whether for the purpose of clearing the land, or giving the green timber a better opportunity to come to maturity, it has been held not to be waste. *Keeler v. Eastman*, 11 Verm. R. 293; [*Crockett v. Crockett*, 2 Ohio, N. S. 180.]

11. Waste may be done in *houses*, by pulling them down, or by suffering them to be uncovered, whereby the timbers become rotten. If, however, a house be uncovered when the tenant comes in, it is no waste to suffer it to fall down; but it would be waste to pull it down, unless it is rebuilt. (a)

12. If a lessee for life razes a house, and builds a new one, which is not so large as the former, it is waste.<sup>1</sup> But  
118 \* where an \*old house falls down, and the tenant builds a new one, it need not be so large as the old one. (b)

13. If glass windows, though put in by the tenant himself, be broken or carried away, it is waste. So it is of wainscot benches, doors, furnaces, and the like, annexed or fixed to the house, either by the reversioner or the tenant. (c)<sup>2</sup>

14. A tenant for life *cannot dig* for gravel, lime, clay, brick, earth, stone, or the like, unless for the reparation of buildings, or manuring of the land. Nor can he *open a new mine*; but he may dig and take the profits of mines that are open. (d)<sup>3</sup>

15. Lord King has said that a tenant for life of coal mines, may open *new pits or shafts* for working the old veins of coals; for otherwise working the same mines would be impracticable. (e)

16. If a person has mines within his land, and leases the land,

(a) 1 Inst. 53. a.      (b) Bro. Ab. Waste, 93.      (c) 1 Inst. 53. a.

(d) 1 Inst. 53. b. 54. b. Saunders's case, 5 Rep. 12.

(e) Clavering v. Clavering, 2 P. Wms. 388. (Findlay v. Smith, 6 Munf. 134; Crouch v. Puryear, 1 Rand. 253.)

<sup>1</sup> So, if he changes the nature of the house by altering it injuriously, as by changing it into a warehouse, with machinery for raising heavy packages, it is waste. Douglass v. Wiggins, 1 Johns. Ch. 437; Bonnett v. Sadler, 14 Ves. 526. And see Doe v. Jones, 4 B. & Ad. 126; Hasty v. Wheeler, 3 Fairf. 434, 439. But if the alteration is not injurious either to the building or to the title and inheritance, it is not waste. Young v. Spencer, 10 B. & C. 145.

<sup>2</sup> See Amos and Ferard on Fixtures, part 1, where the nature of this kind of property, and the rights of different classes of tenants therein, are fully treated.

<sup>3</sup> Whether the tenant can work old abandoned mines or pits, which the author of the gift has neither worked nor prepared to work, or which he has not worked but has made preparations to work, — *quære*; and see Viner v. Vaughan, 2 Beav. 446; 4 Jur. 332. [A tenant for life of land containing opened coal mines, may take coal therefrom not only for his own use, but for sale; and he may also take timber from the premises for mining operations. Neel v. Neel, 19 Penn. (7 Harris,) 323. Opening a new mine in leased land is waste, unless the lease is of all mines in the land. Owings v. Emery, 6 Gill. 260.]

and all mines therein, the lessee may dig for them ; for otherwise he can derive no advantage from the mines. (a)

17. Where a person seised in fee of lands, in which there were mines unopened, conveyed those lands, and all mines, &c., to trustees and their heirs, to the use of A for life, &c., A having threatened to open the mines, the reversioner brought in a bill in Chancery to stay him. It was argued on behalf of A that the mines being expressly granted by the settlement with the lands, it was as strong a case as if the mines themselves were limited to A for life, and like Saunders's case. But Lord Macclesfield said, that A, having only an estate for life, subject to waste, could no more open a mine, than cut down timber trees. On a rehearing, Lord King was of the same opinion. (b)

18. The *conversion of one kind of land into another*, as the changing of meadow to arable, is also waste ; because it not only *changes the course of husbandry*, but also the *evidence of the estate*. In a subsequent case it was said *arguendo*, that the ploughing of pasture may be, or may not be, waste ; and to make it such, it ought to have been pasture time out of mind. It was not enough to say that it was pasture ground *diu ante*. Mr. Justice Jones said, arable and pasture ground are convertible ; and that which is one of them this year may be the other next, for the law does not so much distinguish. (c)

19. The plowing up, burning and sowing of down land, is waste. But in the present improved state of agriculture, I\* presume that the old doctrine respecting a change of the \* 119 course of husbandry would not be strictly adhered to. (d) <sup>1</sup>

(a) Saunders's case, 5 Rep. 12.

(b) Whitfield v. Bewit, 2 P. Wms. 240.

(c) 1 Inst. 53. b. Dyer, 37. a. Gunning v. Gunning, 2 Show. R. 8. (Simmons v. Norton, 7 Bing. 640.)

(d) Worsley v. Stewart, *infra*, s. 35.

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<sup>1</sup> See Harrow School v. Alderton, 2 B. & P. 86 ; 3 Dane's Abr. ch. 78, art. 5. If the tenant by an act of good husbandry, causes an injury which due prudence could not have foreseen, it shall not make him a wrongdoer. Thus, where he prudently turned the current of a creek, whereby the water flowed into a swamp, and killed the trees growing there ; it was held no waste. Jackson d. Van Rensselaer v. Andrew, 18 Johns. 431. [The doctrine of waste, as understood in England, is not applicable to a new and unsettled country. Kidd v. Dennison, 6 Barb. Sup. Ct. 9. In Ohio, it would not be waste to convert meadow or pasture into plough land, or wood land into a farm. Crockett v. Crockett, 2 Ohio, N. S. 180. See also Clemence v. Steere, 1 Rhode Island, 272.]

20. As some chattels are considered in law as part of the inheritance, and called *heir looms*, so the destruction of them is waste. Thus, if a tenant for life of a park, vivary, warren, or dove-house, kills so many of the deer, fish, game, or doves, that there is not sufficient left for the stores, it is waste. (a) <sup>1</sup>

21. *Permissive waste* chiefly consists in suffering the buildings on an estate to decay. But if a house be ruinous at the time when the tenant for life comes into possession, he is not punishable for suffering it to fall down; for in that case he is not bound by law to repair it. Yet if he cuts down timber, and therewith repairs it, he may justify; because the law favors the maintenance of houses. (b) <sup>2</sup>

22. The Court of Chancery will not decree a tenant for life to repair, or appoint a receiver, with directions to repair; for it would tend to harass tenants for life; and suits of this kind would be attended with great expenses, in depositions about repairs. (c)

23. It is a general rule that waste which ensues from the *act of God* is excusable. So that if a house falls in consequence of a tempest, the tenant will be excused. But where a house is uncovered by a tempest, the tenant is bound to repair it within a reasonable time, before the timbers grow rotten. (d)

(a) Tit. 1. 1 Inst. 53. a. 2—304.

(b) 1 Inst. 53. a. 54. b.

(c) Wood v. Gaynon, Amb. 395.

(d) 2 Roll. Ab. 820.

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<sup>1</sup> Tenant for life of heir looms, or other chattels, may be required to give an inventory of them, and an undertaking to take proper care of the property; but not to give other security, unless danger is apprehended. *Foley v. Burnell*, 1 Bro. C. C. 274, 279; *Conduitt v. Soane*, 1 Colly. 285.

<sup>2</sup> If he cuts timber for repairs, but finding it not perfectly suitable, sells it, and with the money buys suitable timber and applies it to the same purpose, it is not waste. *Loomis v. Wilbur*, 5 Mason, R. 13.

[A tenant for life is required to keep the buildings on his estate from going to decay, by using ordinary care; but he is not required to expend any extraordinary sums. *Wilson v. Edmonds*, 4 Foster (N. H.) 517. A tenant for life who puts improvements on the land, is not, as a general rule, entitled to compensation from the reversioner. *Corbett v. Laurens*, 5 Rich. Eq. 301. But where such improvements are for the mutual advantage of the tenant for life and the reversioner, the tenant for life will be allowed their value out of the proceeds of sale, if the sale is made for the benefit of all interested in the property. *Gambriel v. Gambriel*, 3 Md. Ch. Decis. 259. See also *Daviess v. Myers*, 13 B. Mon. 511. It is waste in a tenant for life to pull down a house which is not repairable, and which, therefore, he is not bound to repair; but it is no waste to tear down a barn which is so dilapidated that there is danger that it will fall upon the cattle. *Clemence v. Steere*, 1 Rhode Island, 272.]

24. If the banks of a river are destroyed by a sudden flood, it is not waste. If, however, the banks of the river Trent are un-repaired, it is waste; because the Trent is not so violent, but that the lessee, by his industry, may well enough preserve its banks. (a)

25. By the common law, where lands were *granted* to a person for life, he was not liable to an *action for waste* unless he was restrained by express words in his conveyance, from committing waste; because it was in the power of the person who created the estate to impose such terms on his tenant as he thought proper. This doctrine was found extremely inconvenient, as tenants took advantage of the ignorance of their landlords, and committed acts of waste with impunity. (b)

26. To remedy this grievance the Statute of *Marlbridge*, 52 Hen. III. c. 24, gave to the owners of the inheritance an action \* of waste against tenants for life; in which they \*120 were entitled to recover full damages for the waste committed. But as the recompense given by this statute was frequently inadequate to the loss sustained, the Statute of *Gloucester*, 6 Edw. I. c. 5, increased the punishment, by enacting that the place wasted should be recovered, together with *treble damages*, as an equivalent for the injury done to the inheritance. (c)<sup>1</sup>

(a) 1 Inst. 53. b. Dyer, 33. a. Moo. 69.

(b) Blackst. Com. B. 3. c. 14. (1 Inst. 53. b. 54. a.)

(c) 2 Inst. 144, 299.

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<sup>1</sup> This subject is variously regulated by statutes, in most of the United States. Thus, in *South Carolina*, damages alone are given, without forfeiture, by a reenactment of the statute of *Marlbridge*. 2 Brevard's Dig. p. 331. In *Pennsylvania*, the writ of *estrepement* is used, against lessees for years and at will, mortgagors and judgment debtors. 4 Kent, Comm. p. 78; Purdon's Dig. p. 965, 5th ed. In *Maryland*, the remedy is by injunction, with the penalty of double damages for disobeying the writ. Dorsey's LL. Maryl. Vol. I. p. 224, 225; [Green v. Keen, 4 Md. 98.] In other States the remedy is by writ of waste, with a forfeiture of the place wasted, and damages. These damages are single, in *Maine*, Rev. St. ch. 129, § 1; *Massachusetts*, Rev. St. ch. 105, § 1; and in *Michigan*, Rev. St. 1838, p. 496. They are double in *Rhode Island*, Rev. St. 1844, p. 186; and in *Delaware*, Rev. St. 1829, p. 166, 167. They are treble in *New York*, Rev. St. Vol. II. p. 428, 429, 3d ed.; *New Jersey*, Elmer's Dig. p. 593; *Virginia*, Tate's Dig. p. 517, 518; *North Carolina*, LL. N. Car. Vol. I. p. 609; and *Kentucky*, LL. Ky. Vol. II. p. 1530, tit. 178. [The Statute of Gloucester has not been adopted in Georgia. Parker v. Chambliss, 12 Geo. 235.]

In other States, the legislation on this subject is confined to tenants in dower. And they are made liable to damages only, with no mention of forfeiture, by the statutes of *New Hampshire*, Rev. St. 1842, ch. 165, § 7; *Vermont*, Rev. St. 1839, ch. 51, § 14; and

27. No person is *entitled to an action of waste* against a tenant for life, but he who has the immediate estate of inheritance, expectant on the determination of the estate for life.<sup>1</sup> If there is an estate of freehold *in esse*, interposed between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, then during the continuance of such interposed estate the action of waste is suspended; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone forever. (a)<sup>2</sup>

28. Where a tenant for life commits waste, and afterwards *assigns over* his estate, yet an action of waste may be brought against him. (b)<sup>3</sup>

29. If a woman lessee for life marries, and her *husband commits waste*, and after the wife dies, the action of waste is gone; for the husband never had any estate but in right of his wife. (c)<sup>4</sup>

(a) 1 Inst. 53. b. 218. b. n. 2. Paget's case, 5 Rep. 76. b. Bray v. Tracey, Cro. Jac. 688.

(b) 2 Inst. 302.

(c) Clifton's case, 5 Rep. 76.

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*Mississippi*, Howard & Hutchinson's Dig. p. 351;—to forfeiture, with single damages, in *Indiana*, Rev. St. 1843, part 2, ch. 28, § 106;—and to forfeiture only, with no mention of damages, in *Ohio*, Rev. St. 1841, ch. 42, § 15; and in *Illinois*, Rev. St. 1838, p. 237. But in the latter State, the forfeiture is incurred only by wanton and wilful waste; the dowress being liable, for "negligent or inadvertent waste," to damages only. See further, *Smith v. Follansbee*, 1 Shepl. 273; *Sackett v. Sackett*, 8 Pick. 309; *Hasty v. Wheeler*, 3 Fairf. 434; *Bright v. Wilson*, Cam. & Norw. 24; *Robinson v. Miller*, 2 B. Monr. 284, 292.

<sup>1</sup> Hence, at common law, the heir could not have this action, for waste done in the lifetime of the ancestor. 1 Inst. 53, b. But in several of the United States this remedy is given to the heir by statute. *Maine*, Rev. St. ch. 129, § 2; *Massachusetts*, Rev. St. ch. 105, § 2; *New York*, Rev. St. Vol. II. p. 428, 3d ed.; *New Jersey*, Elmer's Dig. p. 593; *Delaware*, Rev. St. 1829, p. 167; *Virginia*, Tate's Dig. p. 518; *North Carolina*, LL. N. Car. Vol. I. p. 610; *Kentucky*, LL. Ky. Vol. II. p. 1531; *Michigan*, Rev. St. 1838, p. 496. See also *McLaughlin v. Long*, 5 Har. & Johns. 113.

<sup>2</sup> In *Indiana*, the remainder-man or reversioner may have an action of waste, notwithstanding an interposed estate for life or years. Rev. St. 1843, p. 452. So, in *Michigan*, Rev. St. 1838, p. 496; *Maine*, Rev. St. ch. 129, § 5; *Massachusetts*, Rev. St. ch. 105, § 5.

<sup>3</sup> By Stat. 11 Hen. 6, c. 5, if tenant for life or years assigns his estate, but continues still to take the profits to his own use, he is liable to this action for waste afterwards committed. This statute has been reenacted in several of the United States. See Tate's Dig. LL. Virg. p. 518; Elmer's Dig. LL. N. Jersey, p. 593; *North Carolina*, Rev. St. Vol. I. ch. 119, p. 609; *Delaware*, Rev. St. 1829, p. 166; LL. Kentucky, Vol. II. p. 1530; *N. York*, Rev. St. Vol. II. p. 428, 3d ed.

<sup>4</sup> The husband is in such case still held liable, by statute, in *Delaware*. Rev. St. 1829, p. 166.

30. The Statute of Marlbridge only prohibits farmers from committing waste; yet if they *suffer a stranger to do waste*, they shall be charged with it; for it is presumed in law that the farmer may withstand it; *et qui non obstat, quod obstaré potest, facere videtur*. Secondly, the law gives to every man his proper action; therefore the lessor shall have his action of waste against the lessee; and the lessee his action of trespass against the person who committed the waste. (a)

(31. By the common law, the *action of waste* did not lie, except against those who came to their estates by *act of law*, as, tenants by the curtesy, or in dower. For as the law gave the estate, without and even against the will of the party, it was reasonable that the reversioner should have this remedy, for the protection of the inheritance. And hence this action lay against such tenant, as long as he lived, even for waste done by one to whom he had assigned over his estate; and did not lie against the assignee, who was deemed only his servant. Which law, says Lord Coke, continueth to this day. The Statutes of Marlbridge and of Gloucester gave the action of waste, in general terms, against every tenant, holding in any manner for life or years; but this was held not to supersede nor affect the remedy already existing by the common law, which is always esteemed the safer and better remedy. But if the heir grants away the reversion, and the tenant also assigns his estate, the assignee attorning to the grantee of the reversion, a *new estate for life* is thus created *by act of the parties*.<sup>1</sup> The remedy at common law is, therefore, gone, and the action of waste lies only by force of the statute, and hence it lies against the wrongdoer himself. So, if the heir grants away the reversion, and the tenant in dower or by the curtesy attorns to the grantee, a new estate for life is here created by act of the parties, and the grantee of the reversion can sue only upon the statute, the remedy at common law having failed.<sup>2</sup>)

(a) (2 Inst. 145, 146. 1 Inst. 54. a. White v. Wagner, 4 H. & J. 373. Fay v. Brewer, 3 Pick. 203.)

<sup>1</sup> Registrum Brevium, fol. 72, b. 73; 2 Inst. 301, F. N. B. [56.]

<sup>2</sup> 2 Inst. 300, 301, F. N. B. [56,] 128, 129; Thel. Dig. lib. 10, c. 21, § 10, 11, fol. 112; 22 Vin. Abr. 468, 475; Waste, S. U.; Jackson on Real Actions, p. 331; Bates v. Shraeder, 13 Johns. 260. Walker's case, 3 Co. 23, b. But in *Delaware*, the assignee, if he commits waste, is made liable in all cases, in the same manner as the assignor. See *Delaware*, Rev. St. 1829, p. 166. So, in *N. York*, Rev. St. Vol. II. p. 428, 3d ed.

32. The late Mr. Serjeant Williams, in his excellent Notes on Saunders's Reports, observes that the action for waste is now very seldom brought;† having given way to a much more expeditious and easy remedy by an *action on the case, in the nature of waste*; which may be brought by the person in reversion or remainder for life or years, as well as in fee; and the plaintiff is entitled to costs; which he cannot have in an action of waste. (a)

121 \* 33. Lord Cowper says, that without some particular circumstances, there is no remedy in law or equity, for permissive waste, after the death of the particular tenant. (b)

[But in the recent case of *Marquis of Lansdowne v. The Marchioness Dowager of Lansdowne*, it was decided that a bill might be maintained against the representatives of a deceased tenant for life for equitable waste committed by him; and that, although according to the maxim *actio personalis moritur cum persona*, yet if the tort or injury is of such a nature as that thereby property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor‡ at law, for legal waste;¹ and that equity would decide in respect of equitable waste, in analogy to a court of law. In the above case, the late Marquis of Lansdowne, tenant for life without impeachment of waste, had abused his power of cutting down timber, by cutting ornamental trees, and trees not fit for felling.] (c)

(a) 2 Saund. 252, n. 7.

(b) *Turner v. Buck*, 22 Vin. Ab. 523.

(c) 1 Mad. 116. *Garth v. Cotton*, 1 Dick. 183. S. C. 3 Atk. 751. 1 Ves. S. 524, 546. Cowp. 376.

[† The writ of waste is abolished after 1st June, 1835, by Stat. 3 & 4 Will. 4, c. 27, s. 36. See Vol. III. tit. 31, ch. 2, sect. 5, note.]

[‡ By Stat. 3 & 4 Will. 4, c. 42, s. 2, remedies by action of trespass or trespass on the case, are given against the executors of any deceased person, for any wrong committed by him in his lifetime against the property, real or personal, of another, committed within six months before the death, the action to be brought within six months after the executors, &c., have taken upon themselves the administration of the effects of the deceased. Similar remedies are given to executors for injuries done to the property real or personal of their testators.]

¹ Where property is tortiously acquired, the value may be recovered, in *assumpsit*, against the legal representatives of the wrongdoer. *Hambly v. Trott*, Cowp. 375. And where, in such case, an action *ex delicto* is brought against the wrongdoer, and he dies *pendente lite*, the suit, in several of the United States, is made by statute to survive against his executor or administrator, who may be called in to defend it.



34. It is stated in 1 Roll's Ab. 377, pl. 13, that if there be lessee for life, the remainder for life, the remainder or reversion in fee, and the lessee in possession wastes the land; though he is not punishable by the common law, during the remainder for life, yet he may be *restrained in Chancery*, for this is a particular mischief. And Lord Keeper Egerton is reported to have said that he had seen a precedent in the time of Richard II., where, in such a case, it was decreed in Chancery, by the advice of the judges, on complaint of the remainder-man in fee, that the first tenant should not commit waste; and an injunction granted. The courts of equity have long pursued this principle, and will award a perpetual injunction against waste whenever the case requires it. (a)<sup>1</sup>

(a) Moor. 554.

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<sup>1</sup> The jurisdiction of Courts of Equity, in cases of waste, is thus briefly stated by Mr. Justice Story, in his Commentaries on Equity Jurisprudence, Vol. II. § 913 to 919:—

“There are many cases, where a person is punishable at law for committing waste, and yet a Court of Equity will enjoin him. As, where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained, by injunction, from committing waste, although if he did commit waste, no action of waste would lie against him by the remainder-man for life, for he has not the inheritance, or by the remainder-man in fee, by reason of the interposed remainder for life. Com. Dig. *Waste*, C. 3; *Abraham v. Bubb*, 2 Freem. Ch. R. 53; *Garth v. Cotton*, 1 Dick. 183, 205, 208; S. C. 1 Ves. 555; *Perrot v. Perrot*, 3 Atk. 94; *Robinson v. Litton*, 3 Atk. 210; *Eden on Injunct.* ch. 9, p. 162, 163; *Davis v. Leo*, 6 Ves. 787. So, a ground landlord may have an injunction to stay waste against an under-lessee. *Farrant v. Lovell*, 3 Atk. 723; S. C. *Ambler*, R. 105; 3 Wooddes. Lect. 56, p. 400—404. So, an injunction may be obtained against a tenant from year to year, after a notice to quit, to restrain him from removing the crops, manure, &c., according to the usual course of husbandry. *Onslow v. —*, 16 Ves. 173; *Pratt v. Brent*, 2 Madd. R. 62. So, it may be obtained against a lessee, to prevent him from making material alterations in a dwelling-house; as, by changing it into a shop or warehouse. *Douglass v. Wiggins*, 1 Johns. Ch. R. 435.

“In the next place, Courts of Equity will grant an injunction in cases where the aggrieved party has equitable rights only; and, indeed, it has been said, that these Courts will grant it more strongly, where there is a trust estate. *Robinson v. Litton*, 3 Atk. 200; *Garth v. Cotton*, 1 Dick. 183; S. C. 1 Ves. 555; *Stansfield v. Habergham*, 10 Ves. 277, 278. Thus, for instance, in cases of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will be granted, although there is no remedy at law. *Ibid.*; *Farrant v. Lovell*, 3 Atk. 723; *Eden on Injunct.* ch. 9, p. 165, 166; 3 Wooddes. Lect. 56, p. 405; *Brady v. Waldron*, 2 John. Ch. R. 148; *Humphreys v. Harrison*, 1 Jac. & Walk. 581; [*Gray v. Baldwin*, 8 Blackf. 164.] So, where there is a contingent estate, or an executory devise over, dependant upon a legal estate, Courts of Equity will not permit waste to be done to the injury of such estate; more especially not, if it is an executory devise of a trust

35. Although no action of waste lies where there is an intermediate estate, yet if *waste be done by felling timber trees*, the person *entitled at that time to the inheritance* in fee, or in tail,

estate. *Stansfield v. Havergham*, 10 Ves. 278; *Eden on Injunct.* ch. 9, p. 170, 171; 3 Wooddes. Lect. 56, p. 399, 400; *Jeremy, Eq. Jurisd. B. 3*, ch. 2, § 1, p. 339.

"In the next place, in regard to equitable waste, which may be defined to be such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a Court of Equity, are so esteemed, from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. As if the mortgagor in possession should fell timber on the estate, and thereby the security would become insufficient, (but not otherwise,) a Court of Equity will restrain the mortgagor by injunction. *King v. Smith*, 2 Hare R. 239. So, if there be a tenant for life without impeachment for waste, and he should pull down houses, or do other waste wantonly or maliciously, a Court of Equity would restrain him; for, it is said, a Court of Equity ought to moderate the exercise of such a power, and *pro bono publico*, restrain extravagant humorous waste. *Abraham v. Bubb*, 2 Freem. Ch. R. 53; *Lord Barnard's case*, Prec. Ch. 454; *S. C.* 2 Vern. 738; *Aston v. Aston*, 1 Ves. 265. Upon this ground, tenants for life without impeachment for waste, and tenants in tail, after possibility of issue extinct, have been restrained, not only from acts of waste to the destruction of the estate, but also from cutting down trees planted for the ornament or shelter of the premises. *Ibid*; *Eden on Injunct.* ch. 9, p. 177 to 186; *Burgess v. Lamb*, 16 Ves. 185, 186; *Marquis of Downshire v. Sandys*, 6 Ves. 107; *Lord Tamworth v. Lord Ferrars*, 6 Ves. 419; *Day v. Merry*, 16 Ves. 375; *Att'y. General v. Duke of Marlborough*, 3 Madd. R. 539, 540; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (p); 3 Wooddes. Lect. 56, p. 402, 403; *Jeremy on Eq. Jurisd. B. 3*, ch. 2, § 1, p. 333 to 336; *Wellesley v. Wellesley*, 6 Sim. R. 497. In all such cases, the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties. [*Marker v. Marker*, 4 Eng. Law & Eq. Rep. 95.]

"Upon similar grounds, although Courts of Equity will not interfere by injunction to prevent waste in cases of tenants in common, or coparceners, or joint tenants, because they have a right to enjoy the estate, as they please; yet they will interfere in special cases; as, where the party committing the waste is insolvent; or, where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoyment of the estate. *Eden on Injunct.* ch. 9, p. 171, 172; *Twort v. Twort*, 16 Ves. 128, 131; *Hale v. Thomas*, 7 Ves. 589, 590; *Hawley v. Clowes*, 2 John. Ch. R. 122. The Statute of Westminster 2d, ch. 22, provided a remedy for tenants in common and joint tenants in many cases of waste, by providing that, upon an action of waste, the offending party should make an election to take the part wasted in his party, or to find surety to take no more than belonged to his share. But this statute only applied to cases of freehold.

"From this very brief view of some of the more important cases of equitable interference in cases of waste, the inadequacy of the remedy at common law, as well to prevent waste as to give redress for waste already committed, is so unquestionable, that there is no wonder that the resort to the courts of law has, in a great measure, fallen into disuse. The action of waste is of rare occurrence in modern times—*Harrow School v. Alderton*, 2 Bos. & Pull. 86; *Redfern v. Smith*, 1 Bing. R. 382; 2 Bing. R. 262—an action on the case for waste being generally substituted in its place, whenever any remedy is sought at law. The remedy by a bill in equity is so much more easy, expeditious, and complete, that it is almost invariably resorted to. *Eden on In-*

may seize them, or bring an action of trover for the recovery of them. For a tenant for life has but a special interest in the trees growing on the land, so long as they are annexed to it; but if he or any other person severs them from the land, the interest

unct. ch. 9, p. 159. By such a bill, not only may future waste be prevented, but, as we have already seen, an account may be decreed, and compensation given for past waste. Ante, § 515 to 518; *Eden on Injunct.* ch. 9, p. 159, 160; *Ib.* ch. 40, p. 206 to 219. Besides, an action on the case will not lie at law for permissive waste. *Gibson v. Wells*, 4 Bos. & Pull. 290; *Herne v. Bembow*, 4 Taunt. R. 764. But in equity an injunction will be granted to restrain permissive waste, as well as voluntary waste. *Eden on Injunct.* ch. 9, p. 159, 160; *Caldwall v. Baylis*, 2 Meriv. R. 408; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (p.) [A Court of Equity will not interfere to make a tenant for life liable for permissive waste. *Powys v. Blagrave*, 27 Eng. Law & Eq. Rep. 568.]

"The interference of Courts of Equity in restraint of waste was originally confined to cases founded in privity of title; and for the plaintiff to state a case, in which the defendant pretended that the plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under an adverse right, was said to be, for the plaintiff to state himself out of Court. But at present the Courts have, by insensible degrees, enlarged the jurisdiction to reach cases of adverse claims and rights, not founded in privity; as, for instance, to cases of trespass, attended with irreparable mischief, which we shall have occasion hereafter to consider. See the cases fully collected by Mr. *Eden*, *Eden on Injunct.* ch. 9, p. 191 to 196, ch. 10, p. 206 to 214; *Livingston v. Livingston*, 6 John. Ch. R. 497; *Smith v. Collyer*, 8 Ves. 90.

"The jurisdiction, then, of Courts of Equity, to interpose, by way of injunction, in cases of waste, may be referred to the broadest principles of social justice. It is exerted, where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such, that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief—*Watson v. Hunter*, 5 Johns. Ch. R. 170; *Jeremy on Equity Jurisd.* B. 3, ch. 2, § 1, p. 327, 328; *Winship v. Pitts*, 3 Paige, R. 259—and, where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons, having but temporary and limited interests in the subject-matter. On the other hand, Courts of Equity will often interfere in cases where the tenant in possession is impeachable for waste, and direct timber to be felled, which is fit to be cut, and in danger of running into decay, and thus will secure the proceeds for the benefit of those who are entitled to it. See *Eden on Injunct.* ch. 10, p. 218 to 221; *Burges v. Lamb*, 16 Ves. 182; *Mildmay v. Mildmay*, 4 Bro. Ch. R. 76; *Delapole v. Delapole*, 17 Ves. 150; *Osborne v. Osborne*, 19 Ves. 423; *Wickham v. Wickham*, 19 Ves. 419, 423; *Cooper, R. 288.*" See also *Kane v. Vanderburgh*, 1 Johns. Ch. 11; *Shubrick v. Guerard*, 2 Desaus. 616; *Tessier v. Wyse*, 3 Bland, 60; *Winship v. Pitts*, 3 Paige, R. 259; *Watson v. Hunter*, 5 Johns. Ch. 169; 2 *Robinson's Practice*, 228—231. [Threats to commit waste will authorize an injunction. *Rodgers v. Rodgers*, 11 Barb. Sup. Ct. 595; *White Water Valley Canal Co. v. Comegys*, 2 Carter, (Ind.) 469.]

In a bill to stay waste, if the title of the plaintiff is in dispute, the Court will not ordinarily grant an injunction. *Hough v. Martin*, 2 Dev. & Bat. Eq. R. 379; *Storm v. Mann*, 4 Johns. Ch. 21; *Higgins v. Woodward*, 1 Hopk. Ch. 342. [But it may be granted. *Green v. Keen*, 4 Md. 98.]

of the tenant for life in them is thereby determined, and they become the property of the owner of the inheritance. (a)

123\*      \*36. A feoffment was made to the use of A for life, remainder to the use of his first and other sons in tail; remainder to B for life, remainder to his first and other sons in tail. B had issue a son, and after A, not having any son, cut down timber. It was resolved that the son of B might have an action of trover against A for the timber, because the property of the trees was in him who had the inheritance of the land when they were cut; and though the remainder for life to B was an impediment to an action of waste during his life, yet it was not any impediment to his son, as to the property of the trees, when severed from the land, which B could not have for the debility of his estate. And the possibility of the estate which might come to the son of A, if A should have a son, was not any impediment; inasmuch as it was a mere possibility, which peradventure never would happen, and was nothing in law till it happened, and might be destroyed by the feoffment of A. (b)

37. One seised in fee of lands conveyed them to trustees and their heirs, to the use of A for life, remainder to his first and other sons in tail, remainder to B for life, remainder to his first and other sons in tail, remainder to his two sisters and the heirs of their bodies, remainder to the grantor in fee. A and B had no sons, and one of the sisters died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance. A having cut down timber, sold it; the heir of the grantor brought his bill for an account of a moiety. It was objected that it would be more agreeable to the rules of equity that the money produced by the sale of the timber should be brought into court, and put out for the benefit of the sons unborn, and which might be born; that these contingent remainders being in *gremio legis*, and under the protection of the law, it would be most reasonable that the money should be secured for the use of the sons, when there should be any born. But as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff. And the case would be

(a) Bowle's case, 11 Rep. 79. (*Railroad Company v. Kidd*, 7 Dana, R. 250; *Moores v. Wait*, 3 Wend. 104; *Bulkley v. Dolbeare*, 7 Conn. 232; *Richardson v. York*, 2 Shepl. 216; *Berry v. Heard*, Cro. Car. 242; *Palm*, 327, S. C.)

(b) *Uvedale v. Uvedale*, 2 Roll. Ab. 119.

the same if there were a son *in ventre matris*, or the plaintiff might bring trover; and then what reason had he to come into equity. Lord Macclesfield said, the right of this timber belonged to those who, at the time of its being severed from the freehold, were entitled to the first estate of inheritance, \* and \* 124 the property became vested in them. As to the objection that trover would lie at law, it might be very necessary for the party who had the inheritance to bring his bill; because it might be impossible for him to discover the value of the timber, it being in the possession, and cut down by the tenant for life. The cause was reheard by Lord King, who was of the same opinion. (a)

38. It is the same where timber is severed from the land by accident. Thus where a great quantity of timber was blown down by a storm at Welbeck, the seat of the Duke of Newcastle; though there were several tenants for life, with remainder to their first and other sons in tail, yet these having no sons born, the timber was decreed to belong to the first remainderman in tail. (b)

39. Where there are trustees to preserve contingent remainders, the Court of Chancery will not allow of waste, by collusion, between the tenant for life and the person entitled to the first vested estate of inheritance, to the prejudice of persons not *in esse*. (c)

40. Where the tenant for life has also the next existing estate of inheritance, subject to intermediate contingent remainders in tail, the Court of Chancery will not allow him to take advantage of that circumstance, by cutting down timber, but will preserve it for the benefit of the intermediate contingent remainder-men.

41. The Duke of Bolton was tenant for life, with remainder to his first and other sons in tail, remainder to Mrs. Orde for life, remainder to her first and other sons in tail, with estates to trustees to preserve the contingent remainders, remainder to the duke in fee. The duke had no son, but Mrs. Orde had a son born, who died soon after. The duke cut down timber. Mrs. Orde had afterwards another son, who is a defendant in the cause. On the question to whom this timber should belong,

(a) *Whitfield v. Bewit*, 2 P. Wms. 240. 1 Bro. C. C. 194; 3 Bro. C. C. 37. *Pigot v. Bullock*, *infra*.

(b) *Newcastle v. Vane*, 2 P. Wms. 241.

(c) *Garth v. Cotton*, tit. 16. c. 7.

Lord Thurlow was of opinion, that as it was not competent for the duke to cut down timber in respect of his life-estate, he should not take advantage of his own wrong. That the timber, although by severance it became personalty, was yet bound as far as it could be, to the uses of the realty. That the administrator of Mrs. Orde's first son was certainly not entitled, the child being dead at the time of the timber cut. Neither could  
 125 \* her second son \* claim it; for although he had a vested estate of inheritance, yet such estate was liable to be divested by the duke's having a son. He, therefore, thought nobody was then entitled to it; but directed the duke to pay into court the money for which the timber had been sold, and the interest thereof. In pursuance of the above direction, the Duke of Bolton paid in the money arising from the timber. Upon his death in 1794, Mr. Orde, the husband of Mrs. Orde, as administrator of his eldest son, presented a petition to have the money paid to him; the Court directed a bill to be filed. The defendants were, the second son, who was tenant in tail in remainder of the estates, and the Duchess of Bolton, executrix of the late duke. Lord Loughborough said, when the timber was cut, no doubt, at law, the duke would have taken, being the first owner of the inheritance. But the Court very properly held, that he should not, by a fraud on the settlement, which made him tenant for life, gain that advantage to himself in his reversion in fee; considering it as a wrong upon the settlement. The consequence was, that part of the property, which, by the fraud, was taken from the settlement, ought to be restored to it; that would carry it to all the uses. Mrs. Orde would be entitled to an estate for life, the children to estates in tail male; and he could not help the consequence of the reversion in fee going to the duke. (a)

42. The *Court of Chancery* has, in some cases, directed the timber growing on an estate, whereof a person was tenant for life, to be cut down, for the purpose of paying debts and legacies, charged upon the inheritance.

43. A person devised his estate to his wife for life, remainder to A B and his heirs, upon condition that he should pay several

(a) *Williams v. Duke of Bolton*, cited 3 P. Wms. 268. *Powlett v. Duchess of Bolton*, 3 Ves. jun. 374. 1 Cox, Rep. 72. *Dare v. Hopkins*, 2 Cox, R. 110.

legacies at the times appointed in his will; if he did not pay them accordingly, the estate to go over. A B filed his bill in the Court of Chancery, stating that there was a great quantity of timber on the estate, which belonged to him; that he was willing it should be sold, and the legacies paid; but that the widow, who had barely an estate for life, and could make no profit thereof herself, in combination with the other remainderman, designing to make the plaintiff forfeit his estate, by non-payment of the legacies, had refused him permission to fell the timber; though he offered satisfaction for any damages she should thereby sustain. He, therefore, prayed that he might have liberty to cut down and carry off the timber and sell it for payment of the legacies. The Court thought it reasonable that the plaintiff should have liberty to cut down and take off the timber; making satisfaction to the widow for breaking the ground, &c.; and referred it to the Master to see what quantity of timber was necessary to be felled for payment of the legacies, and what might be conveniently spared. (a)

44. The Court of Chancery has also directed timber, in a state of decay, to be cut down for the benefit of the person entitled to the inheritance; provided no damage were done to the tenant for life.

45. Sir G. Ireland, by deed, granted a term for five hundred years to the defendant and others, of his estates in Lancashire to commence after his decease, for payment of debts and annuities; and by will devised the reversion and inheritance thereof to the plaintiff for life, without impeachment of waste, remainder to his first and other sons in tail. The testator being dead, and the trustees in possession under the trust, which was like to have a long continuance; the plaintiff brought his bill, setting forth that he was reduced to great want; that there was much decay in timber on the estate, which the trustees had no power to cut down; and prayed he might be permitted to take off the timber allowing for what damage he did the estate. Although it was objected that the plaintiff might die before the trust was performed, and till then could not be let into possession; therefore to decree that he, in the mean time, might take off the timber

(a) *Claxton v. Claxton*, 2 Vern. 152.

would be a prejudice to his sons; yet the Court decreed a commission to go, to take off timber for the plaintiff's relief and support, not exceeding £500. (a)

46. A was tenant for life, remainder, as to one moiety, to B in tail, and as to the other moiety to an infant. There was timber upon the premises greatly decaying, whereupon B, the remainder-man, brought a bill, praying that the timber, which was decaying, might be cut down, and that B and the infant might have the money. The tenant for life insisted on having a share of the money. Lord Talbot said,—1. The timber 127\* while standing was part of \* the inheritance; but when severed, either by the act of God, as by tempest, or by a trespasser, belonged to him who had the first estate of inheritance in fee or in tail, who might bring trover for it. 2. The tenant for life ought not to have any share of the money arising from the sale of the timber; but since he had a right to what might be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage was done to the tenant for life on the premises, ought to be made good to him. 3. With regard to the timber plainly decaying, it was for the benefit of the persons entitled to the inheritance that it should be cut down, otherwise it was of no value; but this should be done with the approbation of the Master; and trees, though decaying, if for the defence and shelter of the house, or for ornament, should not be cut down. B to have one moiety of the money, and the other moiety to go to the infant. (b)

47. It has been usual, from very ancient times, where estates for life are expressly limited, to insert a clause that the tenant for life shall have the lands, "*without impeachment of waste*;" which words were originally held to exempt the tenant for life from the penalties of the statute of Marlbridge only; not to give the property of the thing wasted. But it is laid down by Lord Coke that the words *absque impetitione vasti*, that is, without challenge or impeachment of waste, enable the tenant for life to cut down timber, and convert it to his own use. Otherwise, if

(a) *Aspinwall v. Leigh*, 2 Vern. 218.

(b) *Bewick v. Whitfield*, 3 P. Wms. 267. *Vide Lee v. Alston*, 1 Bro. C. C. 195.



the words were "without impeachment of any action of waste;" for then the discharge would extend to the action only, and not to the property of the timber. (*a*)

48. To the words, "without impeachment of waste," are sometimes added, with full liberty to commit waste. And in some instances, words of restriction are inserted, as voluntary waste in houses only excepted. In the case of *Garth v. Cotton*, which will be stated hereafter, the words were, "without impeachment of waste, except voluntary waste." And Lord Hardwicke held that there the tenant was punishable for wilful waste; and had no interest in the timber, otherwise than the mast and shade and necessary botes. But some eminent lawyers have lately held that the words voluntary waste only extend to houses, and not to timber trees. (*b*)

49. It has been lately held that the words, without impeachment \* of waste, other than wilful waste, only gave \* 128 to the tenant for life the interest of the money produced by the sale of decaying timber, cut by order of the Court. (*c*)

50. It has been long fully settled that the words, without impeachment of waste, give to the tenant for life the right to fell timber, and also the property of all timber trees felled,† or blown down; and also of all timber, parcel of a building blown down. (*d*)

51. (Accordingly, where timber is cut by order of Court, or by the prudent agreement of all parties in interest, during the life of the tenant for life, impeachable of waste, and the estate is next limited to a tenant for life unimpeachable of waste; the former will be entitled to the interest of the proceeds during his life; but upon his decease, the entire proceeds will belong to the latter, and not to the remainder-man.)<sup>1</sup> It has, however, been held, in a modern case, that a tenant for life, without impeach-

(*a*) 1 Inst. 22. a. 11 Rep. 82. b. (*b*) 1 Ves. 265. Tit. 16. c. 7.

(*c*) *Wickham v. Wickham*, 19 Ves. 419.

(*d*) *Anon. Mos. R.* 238. *Pyne v. Don*, 1 Term R. 55. *Smythe v. S—*, 2 Swanst. 251.

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[† The tenant for life is not entitled to the timber until actually felled; he cannot convey it to another, nor does an authority by him given to another to cut down timber convey any interest, and if not executed in his lifetime, is revoked by the death of the party giving it. *Cholmeley v. Paxton*, 3 Bing. 207. See also *Wolf v. Hill*, 2 Swan. 153, note a.]

*Waldo v. Waldo*, 12 Sim. 107; *Phillips v. Barlow*, 14 Sim. 263.

ment of waste, cannot maintain trover for timber cut during the existence of a prior estate; but that it vests immediately in the owner of the inheritance. (a)

52. Where a tenant for life, without impeachment of waste, makes a lease for years, and the lessee commits waste, no action of waste will lie against him. For the lease is derived out of an estate privileged; and if waste lay, it must be against the tenant for life, who made the lease; and he was punishable. (b)

53. The power which a tenant for life without impeachment of waste has over his estate, with respect to cutting down timber, must be *exercised during his life*; and cannot be delegated to any other person, so as to enable such person to execute it after his death. (c)

54. Lord Hardwicke has said, that where there is tenant for life restrained from waste, remainder to another for life, without impeachment for waste; the Court of Chancery will not suffer any agreement between the two tenants for life to commit waste to take place prior to the period at which the second tenant for life's power properly commences. (d)

55. A tenant for life, without impeachment of waste, is notwithstanding obliged to keep tenants' houses in repair, unless the charge is excessive; and shall not suffer them to run to ruin. (e)

56. The clause, without impeachment of waste, is, however, so far *restrained in equity*, that it does not enable a tenant for life to commit *malicious waste*, so as to destroy the estate; 129 \* which is \* called *equitable waste*; for in that case the Court of Chancery will not only stop him by injunction, but will also order him to repair, if possible, the damage he has done.

57. Lord Barnard, on the marriage of his son, settled Raby Castle on him for life, without impeachment of waste, remainder to his son for life, &c. Afterwards, Lord B., having taken some dislike to his son, got two hundred workmen together, and stripped the castle of the iron, lead, doors, &c., to the value of £3,000. The Court of Chancery immediately granted an injunction to stay committing of waste, in pulling down the castle;

(a) *Pigot v. Bullock*, 1 Ves. Jun. 479.

(b) *Bray v. Tracy*, W. Jones, 51.

(c) *Tit. 2. c. 1. s. 32.*

(d) (*Robinson v. Litton*), 3 Atk. 210, 756.

(e) (*Parteriche v. Powlet*, 2 Atk. 383.)

and, upon the hearing of the cause, decreed not only the injunction to continue, but that the castle should be restored to its former condition. (a)

58. The Court of Chancery will also restrain a tenant for life, without impeachment of waste, from cutting down timber, serving for *shelter or ornament* to a mansion-house; as also timber *not to be felled*.

59. A bill was brought by a remainder-man to restrain a tenant for life, without impeachment of waste, from cutting down timber which served as ornament or shelter to the mansion-house, or which was unfit to be felled. Lord Hardwicke granted an injunction to restrain the defendant from cutting down trees standing in lines, avenues, or ridings in the park. (b)

60. An injunction was moved for to restrain Mr. Bowes, the husband of Lady Strathmore, who was tenant for life, without impeachment of waste, from cutting trees in the rides or avenues to the house, or that served for shade or ornament, or were unfit to be cut as timber. Lord Kenyon (M. R.) granted the injunction, saying it ought to include every thing useful or ornamental to the house; and said he thought himself bound to grant it as to the ornamental trees, though they should not be planted trees, but growing naturally; also to extend it to young saplings, and trees not fit to cut as timber. (c)

61. The Court of Chancery will not, however, in cases of this kind, give any satisfaction to the remainder-man for timber actually cut down. (d)

62. The Court of Chancery will not permit a tenant for life, without impeachment of waste, to commit *double waste*.

63. Lord Archer, being tenant for life, without impeachment \* of waste, of an estate which was decreed to be \*130 sold, and the money invested in the purchase of another estate, to be settled to the same uses, cut down \* timber. Lord Thurlow held that Lord Archer's personal representatives were bound to account for the timber cut; for as Lord A. was to be tenant for life, without impeachment of waste, of the estate to be

(a) *Vane v. Lord Barnard*, 2 Vern. 738. *Rolt v. Somerville*, 2 Ab. Eq. 759.

(b) *Packington v. Packington*, 3 Atk. 215. *Aston v. Aston*, 1 Ves. 264. *O'Brien v. O'Brien*, Amb. 107.

(c) *Strathmore v. Bowes*, 2 Bro. C. C. 88. *Downshire v. Sandys*, 6 Ves. 108. *Tamworth v. Ferrers*, Id. 419. *Day v. Merry*, 16 Ves. 375. *Coffin v. Coffin*, Mad. & Geld. 17.

(d) *Rolt v. Somerville*, 2 Ab. Eq. 759.

purchased, if he might commit waste upon the other estate, before it was sold, he would have the benefit of double waste. (a)

64. The *privileges* given to a tenant for life, by the words, without impeachment of waste, are *annexed to the privity of estate*, and determine with it. Thus it is said that if a lease be made to one for the term of another's life, without impeachment of waste, the remainder to him for his own life, he becomes punishable for waste; for the first estate is gone and drowned. (b)

65. Some cases have arisen where estates for life have been given, with *partial powers of committing waste*; and the Court of Chancery has interposed to restrain the tenants from exceeding such powers.

66. Lands were devised to a person for life, with power to cut down such trees as four persons, named in the will, should allow of, or direct by writing. All these persons being dead, it was decreed that power of cutting down timber, remained; but the Court would preserve the check. It was referred to the Master to see what trees were fit to be cut down. (c)

67. Mr. Dummer devised his estate at C. to his wife for life. In a codicil, he said: "Whereas, by my will, my wife cannot cut any timber, now my will and mind is, that she may, during so long time as she continues my widow, cut timber, for her own use and benefit, at seasonable times in the year." Mrs. Dummer began to fell timber; the person in reversion applied for an injunction. Lord Thurlow utterly rejected the idea that Mrs. Dummer was only to cut timber for her own use, or for estovers; and thought her entitled to cut, not only such timber as would suffer by standing, but every thing which could fairly be called timber; although she could not cut such sticks as would only make paling, or saplings not proper to be cut as timber. (d)

68. Bishops, rectors, parsons, vicars, and other *ecclesiastical persons*, being considered in most respects as tenants for life of the lands which they hold *jure ecclesiæ*, are disabled from  
131\* committing any kind of waste; and if they cut down trees, unless for reparations, they are punishable in the ecclesiastical courts, and also by writ of prohibition. (e)<sup>1</sup>

(a) *Plymouth v. Archer*, 1 Bro. C. C. 159. *Burges v. Lamb*, 16 Ves. 174.

(b) 11 Rep. 83. b. (c) *Hewit v. Hewit*, Amb. 508. 2 Eden's R. 332.

(d) *Chamberline v. Dummer*, 1 Bro. C. C. 166: 3—549. (e) Vin. Abr. tit. Dilapidation.

<sup>1</sup> In the United States the remedy is by bill in chancery, or by action at law. In

69. By the Statute 35 Edw. I. it is declared, that persons shall not presume to fell trees growing in the churchyard, but when the chancel or the body of the church requires reparations. And Lord Coke has cited a case where, upon complaint to the king in parliament, that the Bishop of Durham had committed waste by destroying timber, a prohibition had issued against him. In another case, he is reported to have said, that if a bishop cut down and sold trees, and did not employ them for reparation, and any one would move it, he would grant a prohibition out of the King's Bench. (a)

70. The authority of this *dictum* has been doubted in a modern case, in which the Court of Common Pleas held that it had no power to issue an original writ of prohibition, to restrain a bishop from committing waste, in the possessions of his see, at least at the suit of an uninterested person; and doubted whether even the Court of King's Bench had such a power. (b)

71. It appears, however, that the Court of Chancery has long exercised this kind of jurisdiction; for there is a case stated in 2 Roll. Ab. 813, in which Lord Keeper Coventry granted a prohibition, at the suit of a patron, against a prebendary, for having wasted the trees of his prebend; and this doctrine is now fully established. (c)

72. The patron of a living moved for an injunction against the rector to stay waste, in cutting down timber in the churchyard. Lord Hardwicke said, that a rector might cut down timber for the repairs of the parsonage-house, or the chancel, but not for any common purpose; and this he might be justified in doing under the Statute 35 Edw. I. Stat. 2; that by the custom of the country he might cut down underwood for any purpose; but if he grubbed it up, it was waste. He might cut down timber, likewise, for repairing any old pews that belonged to the rectory; and was also entitled to botes for repairing barns and outhouses belonging to the parsonage. The injunction was granted. (d)

(a) 11 Rep. 49, a. *Stockman v. Whither*, Roll. Rep. 86.

(b) *Jefferson v. Ep. Durham*, 1 Bos. & Pul. 105.

(c) *Ackland v. Atwell*. 2 Roll. Abr. 813.

(d) *Strachy v. Francis*, 2 Atk. 217.

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*Maryland*, if a rector commits waste on the glebe or other lands of the parish, he is liable to pay treble damages, at the suit of the vestry. 1 LL. Maryl. p. 362, Dorsey's ed.

73. A bill was brought by a patron against a rector to stay waste in digging stones, &c., on the glebe, other than what was necessary for repairing and improving the rectory; and 132\* for an \* account of what had been dug and sold. The defendant demurred as to the account; as also to the staying the digging of stones, other than for repairs and improvements; and by way of answer, set out that the quarries were opened before. The Court said, the parson had a fee simple qualified, under restrictions, in right of the church; but he could not do every thing that a private owner of an inheritance could; he could not commit waste; nor open mines, but might work those already opened. Even a bishop could not. Talbot, Bishop of Durham, applied to Parliament to enable him to open mines; but it was rejected. Parsons may fell timber, or dig stones to repair; they have also been indulged in selling such timber or stone, where the money has been applied in repairs. Injunctions have been granted even against bishops, to restrain them from felling large quantities of timber, at the instance of the Attorney-General, on behalf of the crown, the patron of bishoprics. If the demurrer had only gone to an account, it had been good; for the patron cannot have any profit from the living; but it was too general, and must be overruled. (a)

74. In a modern case, Lord Thurlow granted an injunction to stay waste, against the widow of a rector, during the vacancy, at the suit of the patroness. (b)

75. It has been resolved [in 4 Will. and Mary] that an action on the case for dilapidations might be sued against a late incumbent who had resigned a benefice, or against the personal representatives of a deceased rector or vicar, by the successor. And in a modern case it was held that an action for dilapidations also lay for the neglect of repairing a prebendal house, by a succeeding prebendary, against his predecessor, or his personal representative. (c) †

(a) Knight v. Moseley, Amb. 176. Rutland's case, 1 Lev. 107. *contra*.

(b) Hoskins v. Featherstone, 2 Bro. C. C. 552.

(c) Jones v. Hill, Carth. 224. 3 Lev. 268. Radcliffe v. D'Oyly, 2 Term Rep. 630.

† By the statute 56 Geo. 3, c. 52, the incumbents of any benefice, with the consent of the patron and the bishop, are enabled to pay the moneys to arise by sale of any timber cut from the glebe lands of such benefice, either for equality of exchange, or for the price of any house or lands purchased by them, under the authority of a statute which will be stated hereafter. Tit. 32, c. 2.

76. At common law tenants (lessees) for life were not answerable for *damages done by fire*, whether it arose from accident or negligence.<sup>1</sup> When the statute of Gloucester rendered tenants

<sup>1</sup> By the common law, every housekeeper is bound to keep his fire with due, that is, reasonable care. The degree of this care is measured by the degree of danger and the extent of the consequences naturally resulting from the want of it. The remedy in such cases is by an action on the case; in which the plaintiff, in the language of the old entries, declared that by the custom of the realm, *quilibet ignem suum, die et nocte, salvo et securè custodire teneatur, ne pro defectu debitæ custodiæ damnum aliquod vicinis suis eveniat ullo modo*; and alleged that the defendant *ignem suum tam negligenter et improvide apud se custodivit, &c.*, that the plaintiff's property was burnt. Rastell's Entr. p. 8; Beaulieu v. Flinglan, 2 H. 4, 24; Turberville v. Stamp, 1 Com. R. 32; Skin. 681; 1 Salk. 13. The consequences of negligence in such cases are the same as in all others, namely, that the party is held responsible for all its natural and probable results; for these results every man is presumed to foresee and calculate upon. Clark v. Foot, 8 Johns. 431. If the fire was caused by the negligence of his servant, or guest, the master of the house has always been held liable in this action. 2 H. 4, 24; 1 Bl. Comm. 431.

It seems to have been held, that a householder is responsible for damage caused by his fire, even though by misfortune, and without negligence; on the ground of public policy, as in the case of a common carrier; Filliter v. Phippard, 12 Jur. 202, 204; and for this opinion the Year Books, 2 H. 4, 18, 24, and 42, Ass. pl. 9, are usually cited. But the former was a mere *obiter dictum* of Thyrning, in these words,—“Thyrning said, that a man shall respond for his fire, which by *misfortune* burns another's goods;” the action being case for *negligence*, upon the custom of the realm, and the remark entirely uncalled for, if it meant any thing more than that the action would lie for *goods unintentionally* but negligently burnt, which was the case there, as well as for the burning of a house. See Bro. Abr. Action sur le case, pl. 30. The case in 42 Ass. 9, is a short note, in these words,—“A man sued a bill against another of burning his house, *vi et armis*, who pleaded not guilty. And it was found by verdict of the inquest, that the fire broke out suddenly in the house of the defendant, he knowing nothing (thereof,) and burnt his goods and also the house of the plaintiff. Upon which verdict it was adjudged (*agard*) that the plaintiff take nothing by his writ; but he was amerced, &c.” From the case, thus shortly reported, it may be inferred, either that the Court held that no action whatever would lie, there being no negligence on the part of the defendant; or, that trespass *vi et armis* was not the proper remedy; but it shows nothing more.

In regard to the liability of tenants for life or years, in an *action of waste*, for the destruction of the house by accidental fire, without their default, it seems conceded that by the common law they were not liable, but that they were made so by force of the statutes of Marlbridge, 52 H. 3, c. 23, and of Gloucester, 6 Ed. 1, c. 5. The material part of this latter statute is in these words:—“It is provided also, that a man from henceforth shall have a writ of waste in the Chancery, against him that holdeth by law of England or otherwise for term of life, or for the term of years, or a woman in dower. And he which shall be attainted of waste shall leese the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at.” As this statute contained no exception of cases of inevitable accident, it was held to include such cases in the tenant's liability. The authority usually cited for this is that of Lord Coke, who says,—“burning of the house by negligence or mischance is waste.” Co.

for life answerable for waste, without any exception, it  
133 \* rendered \*them responsible for all damages done by fire.

But now, by the Statute 6 Ann. c. 31, s. 6, it is enacted,  
“ That no action, suit, or process whatsoever, shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby; any law, usage, or custom to the contrary notwithstanding.” By the 7th section of this statute it is provided, that nothing in this act shall defeat any contract or agreement made between landlord and tenant.

77. In consequence of this last clause it has been determined, that where a tenant for life, under a settlement, covenanted to keep a house in good and sufficient repair, and the house was burnt down by accident, he was bound to rebuild it. (a)

78. It is now become usual, where the intention of the parties is, that the tenant shall not be liable to rebuild in case of accidental fire, to except it in the covenant to repair. (b)

(a) *Chesterfield v. Bolton*, 2 Com. R. 626. (*Phillips v. Stevens*, 16 Mass. 238. *Redding v. Hall*, 1 Bibb. R. 536, 539. *Pasteur v. Jones*, Cam. & Nor. 194, 201.)

(b) (*Bullock v. Dommitt*), 6 Term Rep. 651.

Lit. 53, b. Rolle repeats it in the same words, in 2 Roll. Abr. 820, l. 42. But it is worthy of notice that Chief Baron Comyns, in stating this doctrine, evidently grounds it upon some negligence of the tenant; his language being,—“*If he suffers the house to be burned by neglect or mischance.*” 6 Com. Dig. 520; *Wast. D.* 2, citing *Co. Lit.* & 2 Roll. as above. In England, however, cases of inevitable accident were specially provided for, by the Stat. 6 Ann. c. 31, § 6; which has been reenacted in the States of *New Jersey* (*Elmer's Dig.* p. 593, § 8,) and *Delaware*, (*Rev. St.* 1829, p. 167, § 26.) How far the statute of Gloucester has been adopted or reenacted in the United States has been stated in a previous note. But it may here be added, that no case is known in which any American Court has construed it to render tenants liable for damage by inevitable accident, as for permissive waste; nor is any action, whether of waste or of trespass on the case, known to have been brought for such damage; and the better opinion is, that no such action could here be maintained. See 4 Kent, Comm. 82; *Co. Lit.* 57, *u.* note 377, by Hargrave; 3 Bl. Comm. 229 note (7) by Christian; *Gibbon on Dilapidations, &c.* p. 51, 53, 54. [See *Davis v. Alden*, 2 Gray, 309.]

[A testator devised to A. for life, a house and other real estate, “he committing no manner of waste, and keeping the premises in good and tenantable repair.” In 1837 A. entered into possession, and in 1844 the house was totally destroyed by an accidental fire. A. was found lunatic by inquisition in 1845, and the lunacy was dated from 1843. Upon petition in lunacy of the remainder-men, who were also committees of the person and estate, it was held, that the lunatic's estate was liable under the terms of the condition to reinstate the house. *In re Skingley*, 3 Eng. Law and Eq. Rep. 91.]



## TITLE IV.

## ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

## BOOKS OF REFERENCE UNDER THIS TITLE.

LITTLETON'S Tenures, § 32—34.

COKE upon LITTLETON, 27—29.

BLACKSTONE'S COMMENTARIES, Book II. ch. 8.

FLINTOFF on Real Property. Vol. II. Book I. ch. 3.

SECT. 1. *How it arises.*8. *It has some Qualities of an Estate Tail.*9. *But it is in Fact only an Estate for Life.*SECT. 10. *This Tenant has the Property of the Timber.*12. *But is restrained from Malicious Waste.*16. *His Privileges not grantable over.*

SECTION 1. We now come to treat of those estates for life which are derived from the operation of some principle of law. Of these the first is called an *estate tail after possibility of issue extinct*; which is thus described by Littleton: "Where tenements are given to a man and to his wife in especial tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. (a)

2. "So if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the entail, then the surviving party is tenant in tail, after possibility of issue extinct." (b)

3. "Also if tenements be given to a man and to his heirs which he shall beget on the body of his wife; in this case the wife hath nothing in the tenements, and the husband is seised as donee in special tail; and in this case, if the wife die without issue of her body, begotten by her husband, then the husband is tenant in tail after possibility of issue extinct. (c)

(a) Lit. s. 32.

(b) Idem.

(c) Id. s. 33.

4. "And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in especial tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life he may by possibility have issue, which may inherit by \*force of the same entail. And in the same manner the issue which is heir to the donees in especial tail cannot be tenant in tail after possibility of issue extinct, for the reason abovesaid." (a)

5. Nothing but a *moral impossibility* of having issue can give rise to this estate. Thus, if a person gives lands to a man and his wife, and to heirs of their two bodies, and they live to a hundred years without having issue, yet they are tenants in tail; for the law sees no impossibility of their having issue. (b)

6. The impossibility of having issue *must proceed from the act of God*, and not from the act of the parties. For if lands be given to a man and his wife, and to the heirs of their two bodies, and after they are divorced *causâ præcontractus*, or *consanguinitatis*, their estate of inheritance is turned to a joint estate for life; and although they had once an inheritance in them, yet for that the estate is altered by their own act, and not by the act of God, *viz.* by the death of either party without issue, they are not tenants in tail after possibility of issue extinct. (c)

7. A person may be tenant in tail, after possibility of issue extinct, of any estate in remainder, as well as of an estate in possession. Thus if a lease be made to A for life, remainder to B and his wife, in special tail; and B dies without issue, his widow will immediately become tenant in tail after possibility of issue extinct. (d)

8. This estate, though strictly speaking not more than an estate for life, partakes in some circumstances of an estate tail. For a tenant in tail after possibility of issue extinct, *has eight qualities or privileges in common with a tenant in tail*. 1. He is dispunishable for waste, because he continues in by virtue of the livery upon the estate tail; and having once had the power of committing waste, he shall not be deprived of it by the act of God. 2. He shall not be compelled to attorn. 3. He shall not have aid of the person in reversion, because he having originally

(a) Littleton, s. 34.

(b) 1 Inst. '28. a.

(c) Idem.

(d) Bowles's case, 11 Rep. 81. a.

the inheritance by the first gift, has likewise the custody of the writings, which are necessary to defend it. 4. Upon his alienation no writ of entry *in consimili casu* lies. 5. After his death no writ of intrusion lies. 6. He may join the mise in a writ of right,† in a special manner. 7. In a *præcipe* brought by \*him, he shall not name himself tenant for life. 8. In a \*136 *præcipe* brought against him, he shall not be named barely tenant for life. (a)

9. There are, however, *four qualities* annexed to this estate, which prove it to be, in fact, *only an estate for life*. 1. If this tenant makes a *feoffment* in fee, it is a forfeiture; because having no longer a descendible estate in him, he cannot transfer such an estate to another, without the prejudice and disherison of the person in remainder. 2. If an estate in tail or in fee in the *same lands descends* upon him, the estate tail after possibility of issue extinct is *merged*.‡ 3. If he is impleaded, and *makes default*, the person in reversion shall be received, as upon default of any other tenant for life. 4. An *exchange* between this tenant and a bare tenant for life is good; for, with respect to duration, their estates are equal. (b)

10. It is said in Herlakenden's case, that if a tenant in tail, after possibility of issue extinct, fells the trees, the lessor shall have them; for inasmuch as he has but a particular estate for life in the land, he cannot have an absolute interest in the trees; but he shall not be punished in waste, because his original estate was not within the statute of Gloucester. This is denied by Lord Coke, who is reported to have said, that at common law *this tenant had a fee, and consequently full power to fell and dispose of the trees*; and notwithstanding the statute *De Donis* had

(a) 1 Inst. 27. b. 2 Inst. 302. 1 Roll. R. 184. 11 Rep. 80. a.

(b) 1 Inst. 27. b. 11 Rep. 80. b.

[† These writs are abolished after the first day of June, 1835, by Stat. 3 & 4 Will. c. 27, s. 36, 37.]

[‡ It has been doubted whether any merger will take place between an estate tail after possibility of issue extinct, and an estate for life, because the former, though equal in quantity, is greater in quality than the latter. *Bowles v. Bertie*, Roll. Rep. 178; *Lewis Bowles's case*, 11 Co. 81; but the more prevailing opinion seems to be that for all the purposes of merger, this estate is to be considered as a mere estate for life, and susceptible of merger as such. 2 Preston's Conveyancing, 3d ed. 222; Co. Lit. 41 b., 42 a.; Bro. Abr. Estate, 25.]

made the estate to be only for life, yet the privilege and liberty was not taken away. (a)

11. In Lewis Bowles's case, the Court observed that tenants in special tail, at the common law, had a limited fee simple; and when their estate was changed by the statute *De Donis*, yet there was not any change of their interest in doing of waste; so when, by the death of one donee without issue, the estate is changed, yet the power to commit waste, and to convert it to his own use, was not altered nor changed, for the inheritance was once in him. And in a modern case Lord Eldon held, 137\* upon the authority of the preceding cases, that tenant in tail after possibility, being dispunishable for waste by law, has equally with tenant for life, without impeachment of waste, an interest and property in the timber. (b)

12. The *Court of Chancery*, by analogy to the rule adopted in the case of a tenant for life, without impeachment of waste, will *restrain* persons seised of estates tail after possibility of issue extinct from pulling down houses, cutting down trees planted for shelter or ornament, or any other kind of *malicious waste*. (c)

13. A woman being tenant in tail after possibility of issue extinct, and having married again, her second husband felled some trees in a grove that grew near, and was an ornament to, the mansion-house. Having an intent to fell the rest, the person in remainder preferred his bill to restrain her from felling those trees. The Court discovered a strong inclination to grant the injunction; but the case was referred. (d)

14. A woman, tenant in tail after possibility of issue extinct, was restrained from committing waste, in pulling down houses, or felling trees, which stood in defence of the house; and also fruit trees in the garden. But for some turrets of trees which stood a land's length or two from the house, the Court would grant no injunction, because she had by law power to commit waste; and yet she was restrained in the particulars aforesaid, because that seemed malicious. (e)

15. On a motion for an injunction to stay a jointress, tenant

(a) 4 Rep. 68. a. 1 Roll. Rep. 184.

(b) 11 Rep. 81. a. Williams v. Williams, 15 Ves. 419. 12 East, 209. 3 Mad. 519.

(c) 2 Ch. Ca. 32.

(d) Abraham v. Bubb, 2 Freem. 53. 2 Show. 68.

(e) Anon. 2 Freem. 278.

in tail after possibility of issue extinct, from committing waste, it was urged that she being a jointress within the Statute 11 Hen. VII. ought, in equity, to be restrained from cutting timber, that being part of the inheritance, which by the statute she was restrained from alienating. The Court granted an injunction against wilful waste in the site of the house, and pulling down houses. (a)

16. The *privileges* which this tenant enjoys arise from the privity of estate, and because the inheritance was once in him; therefore if he grants over his estate to another, *his grantee will be bare tenant for life.* (b)

17. Thus where a tenant of this kind granted over his estate, the grantee was compelled to attorn as a bare tenant for life; and so to be named in a *quid juris clamat*. For although it were \*true that a tenant of this kind was not compel- \*138 lable to attorn, yet that was a privilege annexed to his person, not to the estate; but by the assignment, the privity was altered, and the privilege gone. (c) †

(a) *Cook v. Whaley*, 1 Ab. Eq. 400.

(b) 1 Inst. 28. a.

(c) *Apreece's case*, 3 Leon. 241.

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[† The powers of disposition given by the statute 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries, do not extend to tenants in tail, after possibility of issue extinct, who are expressly exempted from the operation of the act by section 18.]

## TITLE V.

## CURTESY.

## BOOKS OF REFERENCE UNDER THIS TITLE.

LITTLETON'S Tenures, § 35.

COKE upon LITTLETON, 29—30.

BISSET on Estates for Life, ch. 3.

ROPER on the Law of Property arising from the relation between Husband and Wife, ch. 1.

BLACKSTONE'S COMMENTARIES. Book II. ch. 8.

KENT'S COMMENTARIES. Lect. 55.

CHAMBERS on Estates and Tenures, p. 85—95.

FLINTOFF on Real Property. Vol. II. Book I. ch. 3.

## CHAP. I.

ORIGIN OF ESTATES BY THE CURTESY, AND CIRCUMSTANCES REQUIRED TO THEIR EXISTENCE.

## CHAP. II.

OF WHAT THINGS A MAN MAY BE TENANT BY THE CURTESY, AND THE NATURE OF THIS ESTATE.

## CHAP. I.

ORIGIN OF ESTATES BY THE CURTESY, AND CIRCUMSTANCES REQUIRED TO THEIR EXISTENCE.

- SECT. 1. *Origin of Curtesy.*  
 4. *Circumstances required.*  
 5. I. *Marriage.*  
 6. II. *Seisin.*  
 15. III. *Issue.*  
 16. *Who must be born alive.*  
 17. *In the Lifetime of the Wife.*

- SECT. 19. *And be capable of inheriting the Estate.*  
 24. IV. *Death of the Wife.*  
 25. *Curtesy in Gavel-kind.*  
 26. *Who may be Tenants by the Curtesy.*

SECTION 1. The second estate for life, derived from the common law, is that which a husband acquires in his wife's lands by having issue by her; which is called an *estate by the curtesy* of

England.<sup>1</sup> For before issue had, the husband has only an estate during the joint lives of himself and his wife. (a)

2. The law that a husband, who had issue, should retain the lands of his deceased wife during his life, prevailed among all \*the northern nations. And when the customs of the \*140 Normans were reduced into writing, this law was inserted among them, and is thus expressed in the Latin translation of the *Grand Coustumier*, c. 121. *Consuetudo enim in Normaniâ, ex antiquitate approbata, quod si quis uxorem habuerit ex quâ hæredem aliquem procreaverit, quem natum vivum fuisse constituerit, sive vivat, sive decesserit, totum feodum quod maritus possidebat, ex parte uxoris suæ tempore quo decesserit, ipsi marito, quamdiu ab aliis cessabit nuptiis remanebit.* It is said in Horne's Mirror, to have been established in England by King Henry I., which is extremely probable, as there is a full account of it in the Treatise that bears the name of Glanville, written in the reign of King Henry II. (b)

3. An estate by the curtesy of England is thus described by Littleton, s. 35.—“Where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in special tail, and hath issue by the same wife, male or female, born alive; albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life, by the law of England.” And Sir J. Jekyl has observed, that the husband's tenancy by the curtesy has no moral foundation; and is therefore properly called a tenancy by the curtesy of England, that is, an estate by the favor of the law of England. (c)<sup>2</sup>

(a) 1 Inst. 351. a.

(b) Lindebrog, LL. Alleman. tit. 92. (Jura et Consuetudines, Norman. fol. 21.) Mirror, C. 1. s. 3. Glanv. Lib. 7. c. 18. Bract. 437. b.

(c) 2. P. Wms. 703.

<sup>1</sup> This estate falls properly under the head of title by descent, as it accrues by the mere operation of law, upon the death of the wife. See 4 Kent, Comm. 373, note a; 1 Inst. 18, b. note 106; *Post*, tit. 6, ch. 2, § 17, note; Tit. 29, ch. 1, § 22, note.

<sup>2</sup> Chancellor Kent observes that “This estate is not peculiar to the English law, as Littleton erroneously supposes, for it is to be found, with some modifications, in the ancient laws of Scotland, Ireland, Normandy, and Germany. Sir Martin Wright is of opinion, that curtesy was not of feudal origin, for it is laid down expressly in the Book of Feuds, that the husband did not succeed to the feud of the wife, without a special investiture; and he adopts the opinion of Craig, who says, that curtesy was granted out of respect to the former marriage, and to save the husband from falling into poverty; and he deduces curtesy from one of the rescripts of the Emperor Con-

4. Littleton's description of this estate points out *four circumstances* as *absolutely required* to the existence of this estate; namely, I. Marriage. II. Seisin of the wife. III. Issue. IV. Death of the wife.

5. With respect to the *marriage*, it must be between persons capable of contracting together, and duly solemnized. It should, however, be observed, that although where a marriage is void, the man does not acquire a title to curtesy; yet if it be only voidable, and is not annulled during the life of the wife, the husband will be tenant by the curtesy; for a marriage cannot be avoided by the ecclesiastical courts, after the death of either of the parties. With respect to the mode of proving the fact of marriage, it will be stated in the next title. (a)

6. As to the *seisin of the wife*, or of the husband in right of her, it is a circumstance absolutely required; and with respect to corporeal hereditaments, it must be a *seisin in deed*.<sup>1</sup> Thus

(a) 2 Burn's Eccl. Law, 458.

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stantine." 4 Kent, Comm. 28; Wright on Tenures, 194; Craig, Jus. Feud. lib. 2. Dieg. 22, § 40.

The right of the husband as tenant by the curtesy, is expressly given by statute substantially in the language of Littleton, in the States of *Maine, Massachusetts, Vermont, Rhode Island, Delaware, Michigan, and Indiana*. [For a construction of the statute of Indiana, see *Cunningham v. Doe*, 1 Smith, 34.] In other States, as *New York, Virginia, New Jersey, New Hampshire, Ohio, Alabama, Missouri, Illinois, Kentucky, Tennessee, Maryland, North Carolina, Mississippi, and Connecticut*, this estate has been incidentally recognized as an existing legal estate, either in statutes or judicial decisions. In *South Carolina*, the husband takes in fee simple the same share in the wife's estate, which she would, on surviving, take in his; namely, one third; and in certain cases, one moiety, and in one case, two thirds. 1 Brev. Dig. 422-424. In *Georgia*, the husband by the marriage becomes entitled to all the wife's real estate, in the same manner as to her personal property. Prince's Dig. p. 225, 251. In *Louisiana*, the law of husband and wife is based upon principles irreconcilable with the existence of a tenancy by the curtesy.

<sup>1</sup> The common law on this point is not held in the United States with the same degree of strictness as in England; an immediate right of entry, or potential or constructive seisin, where there is no adverse possession, being all that is considered requisite to vest the title of the husband. See Kent, Comm. 29, 30; *Davis v. Mason*, 1 Pet. S. C. R. 507, 508; *Barr v. Galloway*, 1 M'Lean, 476; *Jackson v. Sellick*, 8 Johns. 262; *Green v. Lister*, 8 Cranch, 229, 249; *McCorry v. King*, 3 Humph. Ten. R. 267; *Adair v. Lott*, 3 Hill, N. Y. R. 182. But see *Taylor v. Gould*, 4 Law Rep. 60, N. S.; [S. C. 10 Barb. Sup. Ct. 388; *Day v. Cochran*, 24 Miss. 261.] A recovery alone, in ejectment, by the husband and wife, has been held sufficient for this purpose. *Ellsworth v. Cook*, 8 Paige, 643. In *Connecticut*, a right of entry by the wife is sufficient, by force of the statute of descents, notwithstanding any adverse seisin or possession.



Lord Coke says, if a man dies seised of lands in fee simple, or fee tail general, and they descend to his daughter, who marries, \* has issue, and dies before entry, the husband \* 141 shall not be tenant by the curtesy; yet in this case the husband had a seisin in law. But if she or her husband had entered during her life, he would have been tenant by the curtesy. (a)<sup>1</sup>

7. The *time when the seisin commences*, whether before or after issue had, is immaterial; for if a man marries a woman seised in fee, is disseised, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So if he has issue which dies before the descent of the lands on the wife. (b)

8. If a woman, tenant in tail general, makes a feoffment in fee, and takes back an estate in fee, and marries, has issue, and dies, the issue may in a *formedon* † recover the land against his father; because he is to recover by force of the estate tail, as heir to his mother, and is not inheritable to his father. (c)

Mr. Hargrave has observed upon this passage, that the husband could not have curtesy in respect of the fee, because that was defeated by the son's recovery in the *formedon*; nor in respect of the tail, because the wife's feoffment, before the marriage, had

(a) 1 Inst. 29. a. Tit. 1. (6 T. R. 679. Doe v. Rivers, 7 T. R. 276.)

(b) 1 Inst. 30. a. (Jackson v. Johnson, 5 Cowen, 74.)

(c) 1 Inst. 29. b. n. 3.

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Hillhouse v. Chester, 3 Day, 166; Bush v. Bradley, 4 Day, 298, 306; Kline v. Bebee, 6 Conn. R. 494. A reversionary interest in the wife, expectant upon an estate for life, is not sufficient. Stoddard v. Gibbs, 1 Sumn. 263; Jackson v. Johnson, 5 Cow. 74; Lowry v. Steel, 4 Ohio R. 170; unless the estate for life is a mere equitable interest; Adair v. Lott, 3 Hill, N. Y. R. 182. And on the other hand, a mere naked seisin by the wife, as trustee, is not sufficient, even though she is beneficially interested in the reversion. Chew v. Comm'rs of Southwark, 5 Rawle, R. 160. [Stokes v. McKibbin, 13 Penn. State R. (1 Harris,) 267; Rigler v. Cloud, 14 Ib. 361.]

A husband may have tenancy by the curtesy though the wife be never seised in deed, either actually or constructively of the land; and though the same be adversely held during coverture. Borland v. Marshall, 2 Ohio, (N. S.) 308; Mitchell v. Regan, 3 Ib. 377. But see Dew v. Demarest, 21 New Jersey, 525. In *Kentucky* the actual seisin of the wife must be shown. Orr v. Hollidays, 9 B. Mon. 59; Neely v. Butler, 10 Ib. 48.]

<sup>1</sup> The possession by one tenant in common has been held sufficient to make the husband tenant by the curtesy of his wife's part, she having been of right tenant in common of the other moiety by descent, but dying before actual entry. Sterling v. Penlington, 7 Vin. Abr. 150, pl. 11, per Lord Hardwicke; 14 Vin. Abr. 512, pl. 5, S. C.; 2 Eq. Ca. Abr. 730, S. C. The possession of the feme mortgagor in fee is also sufficient for this purpose. Casborne v. Scarfe, 1 Atk. 603.

[† This writ abolished after the 1st June, 1835, by Stat. 3 & 4 Will. 4, c. 27, s. 36, 37.]

discontinued it; consequently there could be no seisin of it during the marriage.

9. It has been stated that the possession of a lessee for years is the possession of the person to whom the inheritance descends, before entry or receipt of rent. Therefore if lands, which are let for years, descend upon a married woman, who lives beyond the day on which the rent became due, without receiving it, yet her husband will be entitled to curtesy. (a)

10. An estate tail descended from her brother to Alice Richardson, who was married, and had issue; the lands were let on leases for years, and the rents were payable at Michaelmas and Lady-day. The tenants being greatly in arrear, Alice did not receive any of the Lady-day rents, but died four months after that time; nor did any other person receive rent during her life. The question was, whether her husband was entitled to be tenant by the curtesy. (b)

Lord Hardwicke said, if Alice had died before Lady-day, there could not have been a doubt of the husband's right to curtesy, because he could do nothing till the rent became due. The only objection arose from the neglect of the husband in not  
142 \* distraining \* for the rent which became due at Lady-day.

The receipt of rent would have amounted to an actual seisin. If the representatives of the brother had received any rent during the life of the wife, it would have been a material objection; but no part of the rent which accrued after the death of the brother was ever received by the wife, or by any other person; so that the possession of the lessee was the possession of the wife; nor could there be any other without making the husband a trespasser. Decreed that the husband was entitled to be tenant by the curtesy.

11. A *devise* to executors for payment of debts does not prevent the descent of the freehold and inheritance; from whence it follows that, in a case of this kind, there will be curtesy.

12. A person, who had issue a daughter, devised his lands to his executors for payment of his debts, and until his debts were paid. The executors entered. The daughter married, had issue,

(a) Tit. 1. s. 26. (*Jackson v. Johnson*, 5 Cowen, 74. *Lowey v. Steel*, 4 Ohio R. 170.)

(b) *DeGrey v. Richardson*, 3 Atk. 469.

and died; afterwards the debts were paid. It was resolved that the husband should be tenant by the curtesy. (a)

13. Where the wife's estate was let for life before the marriage, the husband cannot acquire a seisin thereof, and will therefore not be entitled to curtesy. If a rent be reserved, it seems doubtful whether the husband will be entitled to have curtesy of it; in a similar case, Lord Coke was of opinion that a wife should have dower. (b)

14. With respect to the seisin which is necessary in *incorporeal hereditaments*, to give a title to curtesy, (a seisin in law, or constructive seisin is sufficient, even at common law, as the husband could not, by any industry, obtain a seisin in deed. If it be a rent, created by means of a conveyance to uses, the grantee immediately acquires a seisin, by the words of the statute.) (c)

15. The third circumstance required to the existence of an estate by the curtesy is *issue*; after which the husband was formerly allowed to do homage alone and was called tenant by the curtesy *initiate*.<sup>1</sup> Such issue must, however, have the following qualities to entitle the husband to curtesy. 1. It must be born alive. 2. In the lifetime of the mother. 3. And be capable of inheriting the estate. (d)

16. By the old law it was deemed necessary that the child should not only be *born alive*, but be heard to cry; and that circumstance was to be proved by persons who actually heard it, not by those who learned it by hearsay. Littleton, however,

(a) Guavara's case, 8 Rep. 96. a. Tit. 8. c. 1. (Robertson v. Stevens, 1 Ired. Eq. R. 247.)

(b) 1 Inst. 29. a. 32. a. (Stoddard v. Gibbs, 1 Sumn. 268.) Tit. 6. c. 3.

(c) (1 Inst. 29. a.)

(d) (Mattocks v. Stearns, 9 Verm. 326.)

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<sup>1</sup> Marriage, seisin, and the birth of living issue, do not alone make the husband tenant by the curtesy; for this estate, though inchoate, is not *in esse* until the death of the wife, though while she lives he may be tenant of the freehold in her right. See Henderson v. Oldham, 5 Dana, R. 254. By the law of *Pennsylvania*, the husband, though tenant by the curtesy initiate, cannot, during the life of the wife, either sell, lease, charge, or in any way affect the land; it being secured to her, as her sole property, during the coverture. His title as tenant of the freehold, commences, *in esse*, at her decease. Stat. Apr. 11, 1848; Dunl. Dig. p. 1124; Gamble's estate, 1 Sel. Eq. Cas. 489. [The interest of a tenant by the curtesy initiate may be attached and sold under execution. Day v. Cochran, 24 Miss. 261. The tenant by curtesy initiate has an estate for life in the wife's estate of inheritance, in his own right. Foster v. Marshall, 2 Foster, (N. H.) 491.]

appears to have doubted whether it was necessary to prove that the child cried; and Lord Coke deduces an argument  
143\* from the \* form of pleading, in cases of this kind, to prove that any other evidence would be sufficient. (a)<sup>1</sup>

17. The issue must be born *in the lifetime of the wife*; so that if she dies in childbed, and the issue is taken out of the womb by the Cæsarean operation, the husband will not be entitled to curtesy. For at the instant of the mother's death he was clearly not entitled, as having had no issue born; but the land descended to the child, while in his mother's womb; and the estate, being once so vested, shall not be taken from him and his heirs. (b)

18. It is immaterial whether the issue be born before or after the seisin of the wife. Thus if, after issue is born, lands descend to the wife, be the issue dead or alive at the time of the descent, the husband shall be tenant by the curtesy. So if, after the death of the issue, the wife acquires land in fee, and dies without having had any other issue, her husband shall be tenant by the curtesy. For the having issue, and being seised during the coverture, is sufficient, though it be at several times. (c)

19. The issue must be such as is *capable of inheriting* the estate; therefore if lands be given to a woman and the heirs male of her body, who has issue a daughter only, her husband will not be tenant by the curtesy. (d)

20. If a woman seised in fee simple marries, has issue, and then her husband dies, and she takes another husband, by whom she also has issue; though the issue by the first husband be living, yet the second husband shall be tenant by the curtesy;

(a) Brac. 438. a. 1 Inst. 29. b. 8 Rep. 34. b. Dyer 25. b.

(b) 1 Inst. 29. b. 8 Rep. 35. a. (Marsellis v. Thalhimer, 2 Paige, 35.)

(c) 8 Rep. 35. b. 13 Rep. 23. (d) 1 Inst. 29. b. 8 Rep. 35. b.

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<sup>1</sup> If the child is born in such an early state of pregnancy as to be incapable of living, it has been held that it was to be considered as if it had never been born or conceived. It has also been held that children, born within the first six months after conception, are to be presumed incapable of living; and therefore cannot take and transmit property by descent, unless they actually survive long enough to rebut that presumption. *Marsellis v. Thalhimer*, 2 Paige, R. 35, per Walworth, C. In *Pennsylvania*, the birth of issue is no longer essential to the husband's title as tenant by the curtesy. *Pennsylv. Rev. St.* 1846, ch. 403, p. 504. *Lancaster Bank v. Stauffer*, 10 Barr, 399; *Gamble's estate*, 1 Sel. Eq. Cas. 489.

because his issue by possibility may inherit, if the first issue die without issue. (a)

21. If the wife has issue, and after is attainted of felony, so as the issue cannot inherit to her, yet the husband shall be tenant by the curtesy, in respect of the issue born before the felony, which by possibility might then have inherited. But if the wife had been attainted of felony before issue had, although she had issue afterwards, the husband would not be tenant by the curtesy. (b)

[22. In the recent case of *Barker v. Barker*, the devise was to A and her heirs; but if she died leaving issue, then to such issue and their heirs. A died leaving issue, and it was held that the husband of A was not entitled to curtesy, as the children

\*took by purchase, and the wife had not such an estate \*144 as could descend upon them.] (c)

23. It is a rule of law that no person can be heir to an ancestor, unless such ancestor died seised: hence probably arose the doctrine which requires an actual seisin in the wife; for, without such an actual seisin, her issue would not be capable of inheriting from her. (d)

24. The fourth and last circumstance required to give a title to curtesy is the *death of the wife*, by which the estate of the husband becomes *consummate*. (e)

25. By the special *custom of gavelkind*, a husband who survives his wife is entitled to a *moiety* of her lands, *whether he has issue or not*; but which in conformity to the custom of Normandy, is forfeited by a second marriage. Mr. Robinson, in his *Treatise on Gavelkind*, observes that this was formerly called the *Man's Free Bench*; and cites a record of 21 Edw. I., in which this custom is recognized. (f)

26. As to the *persons* who are capable of acquiring an estate of this kind, it will be sufficient to observe, that all those who are capable of taking freehold estates, may be tenants by the curtesy.

27. An *alien* cannot, however, be tenant by the curtesy; for although he may take an estate by purchase, for the benefit of the crown, yet he cannot take an estate by act of law; for the law will not transfer an estate to a person who cannot keep it,

(a) 8 Rep. 34. b.

(b) 1 Inst. 40. a.

(c) 2 Sim. 249.

(d) Tit. 29. c. 3.

(e) 1 Inst. 30. a.

(f) 2 Rob. Gav. c. 1. 1 Inst. 30. a. note (1.)

but must immediately give title to another. If an alien be made a denizen, and afterwards has issue, he may be tenant by the curtesy, in respect of such issue; though he would not be entitled on account of issue had before. (a)<sup>1</sup>

28. Persons *attainted* of treason or felony cannot be tenants by the curtesy; for, being *extra legem positi*, they are become incapable of deriving any benefit from the law; and by consequence, of this in particular, which intended to give the inheritance only to those who were capable of holding it during their lives. (b)

(a) Calvin's case, 7 Rep. 25. a.

(b) Bro. Ab. Curtesy, 15.

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<sup>1</sup> As to the rights of aliens to hold lands in the United States, see *ante*, tit. 1, § 39, note. In *Pennsylvania*, though an alien may hold lands to a limited extent, yet he acquires no title as tenant by the curtesy initiate. *Reese v. Waters*, 4 Watts & Serg. 145. And see *acc. Mussey v. Pierre*, 11 Shepl. 559. In *Massachusetts*, the common law is in force; and it has been held, that though an alien husband takes, in his wife's lifetime, the preliminary steps to obtain naturalization, yet unless the naturalization is completed before her death, he cannot be tenant by the curtesy. *Foss v. Crisp*, 20 Pick. 121. [See Statutes 1852, ch. 29.]

[In *North Carolina*, he cannot take by the curtesy such an interest in land as may be sold by a *fi. fa.* *Copeland v. Sands*, 1 Jones, Law, 70.]

## CHAP. II.

OF WHAT THINGS A MAN MAY BE TENANT BY THE CURTESY, AND  
NATURE OF THIS ESTATE.

- SECT. 1. *Estates in Fee Simple.*  
 4. *Estates Tail.*  
 10. *Estates in Coparcenary.*  
 11. *Trust Estates.*  
 13. *Money to be laid out in Land.*  
 15. *Equities of Redemption.*  
 16. *Incorporeal Hereditaments.*  
 17. *What Things are not liable to Curtesy.*

- SECT. 18. *Estates not of Inheritance.*  
 22. *Estates in Joint-Tenancy.*  
 23. *Remainders and Reversions.*  
 25. *Lands assigned for Dower.*  
 26. *Nature of this Estate.*  
 31. *Forfeitable for Alienation.*  
 33. *But not for Adultery.*  
 34. *This Tenant is punishable for Waste.*

SECTION 1. It appears from Glanville, lib. 7, c. 18, that the right to curtesy was originally confined to the *maritagium* of the wife. But when Bracton wrote, this right was extended to all the lands whereof the wife was seised, whether she acquired them by inheritance, or as a *maritagium*, or by donation. And Littleton's description of curtesy extends to *all estates in fee simple.* (a)

2. If a woman, tenant in tail after possibility of issue extinct, takes a husband, has issue, and the fee simple descends upon her, the husband will be entitled to curtesy; because, by the descent of the fee, the estate tail after possibility was merged; and the wife became tenant in fee simple executed. (b)

3. Where, by articles previous to marriage, a woman granted to her intended husband, during their joint lives, the interest of her money, and the rents of her estate, of which she was seised in fee, to maintain the house, &c.; Lord Hardwicke held that this was not intended to abridge the husband's legal rights; therefore \*that he was entitled to be tenant by \*146 the curtesy of the estate whereof his wife was seised at

(a) Bract. 437. b. 8. a.

(b) Bro. Ab. Estate, 25.

the time of the marriage, as well as to an estate which came to her after. (a)

4. Before the statute *De Donis*, conditional fees were subject to curtesy. And when that statute converted them into *estates tail*, husbands were allowed to be tenants by the curtesy of them also.

5. Where lands were given, before the statute *De Donis*, to a man and a woman, and the heirs of their bodies to be begotten, the course of descent was, in some degree, changed by their having issue; for then the land became descendible to all the heirs of the donee's body, and also liable to the curtesy of a second husband. To prevent this, it was enacted by the statute *De Donis* that where lands were given in this manner, a second husband should not be tenant by the curtesy. (b)

6. In Littleton's description of curtesy, it is confined to women seised as *heirs* in special tail. There can be no doubt, however, but that the husband of a woman *donee* in special tail would be also entitled to curtesy.

7. It was formerly doubted whether a man could be tenant by the curtesy of an estate tail, after failure of issue capable of inheriting the estate; by which the estate tail was in fact determined, and the donor's right to the reversion accrued. But it has been resolved that, in a case of this kind, the husband should have his curtesy.

8. A man, having issue two daughters, gave lands to the elder, and the heirs of her body; remainder to the younger, and the heirs of her body. The elder daughter married, and had issue born alive, that died; afterwards she herself died. The younger daughter entered upon the husband of the elder, who claimed to be tenant by the curtesy. It was objected that the husband should not, in this case, be tenant by the curtesy, because the estate of the wife was determined; and the estate of the husband, which was derived out of that of the wife, could not continue longer than the primitive estate endured; for, *cessante statu primitivo, cessat derivativus*. But it was answered and resolved that, at common law, if lands had been given to a woman and the heirs of her body, and she had taken a husband, and had issue, and the issue had died, and the wife had died without

(a) *Stedman v. Pulling*, 3 Atk. 423.

(b) *Paine's case*, 8 Rep. 35, b. 2 Inst. 336.



issue, whereby the inheritance of the land \*reverted to \*147 the donor; in that case the estate of the wife was determined, and yet the husband should be tenant by the curtesy; for that was *tacite* implied in the gift; that the husband was, therefore, entitled, in this case, to hold the estate tail during his life, as tenant by the curtesy. The estate by the curtesy was *not derived* merely out of the *estate of the wife*, but was given to the husband by the *privilege and benefit of the law*; for, as soon as the husband had issue, his title became initiate, and could not afterwards be defeated by the death of the issue; which, being the act of God, ought not to turn to his prejudice. (a)

9. Curtesy is an incident so inseparably annexed to an estate tail, that it cannot be restrained by any proviso or condition whatever. (b)

10. A man may be tenant by the curtesy of an estate in fee simple, or in tail, held in *coparcenary*, or *in common* with other persons; of which an account will be given under those titles. (c)<sup>1</sup>

(11. Although, by the common law, the *feme cestui que use* had no such seisin as would entitle the husband to a tenancy by the curtesy; yet, as Equity follows the Law in the quality of estates, it is a general rule in Equity that a husband will become entitled, as tenant by the curtesy, whenever the wife, during the coverture, is in possession of an equitable estate of inheritance, and has issue, by the husband, capable of that inheritance.<sup>2</sup> And though this right of the husband may, perhaps, be excluded by a possession of the estate strictly adverse to the title of the husband and wife, during the whole period of the coverture; yet the possession of the estate by another, in conformity with their title, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy.<sup>3</sup>)

(a) Paine's case, 8 Rep. 34. 1 Inst. 30. a. (b) 1 Inst. 224. a. 6 Rep. 41. a. (c) Tit. 19 & 20.

[1 Buckley v. Buckley, 11 Barb. Sup. Ct. 43.]

<sup>2</sup> Morgan v. Morgan, 5 Madd. R. 408; Davis v. Mason, 1 Pet. S. C. R. 508, 508; Watts v. Ball, 1 P. Wms. 108; Chaplin v. Chaplin, 3 P. Wms. 229, 234; Casborne v. Inglis, 1 Atk. 603; 2 Eq. Ca. Abr. 728; 4 Kent, Comm. 30, 31.

<sup>3</sup> Parker v. Carter, 4 Hare, 400. And see Follett v. Tyrer, 14 Sim. 125. [Borland v. Marshall, 2 Ohio (N. S.) 308; Mitchell v. Ryan, 3 Ib. 377.]

(12. In some of the United States, it is expressly enacted by statute, that the husband shall be tenant by the curtesy of any equitable estate of inheritance of the wife, in the same manner as of a legal estate of which she was seised.<sup>1</sup>)

13. It has been stated to be a rule in equity that *money agreed or directed to be laid out in the purchase of land*, shall be considered as land to all intents and purposes. And upon this principle it has been held that a man may be tenant by the curtesy of money agreed or directed to be laid out in the purchase of land. (a)<sup>2</sup>

14. A person devised £300 to her daughter Mary, to be laid out by her executrix in the purchase of land, and settled to the only use of her said daughter and her children; if she died without issue, the lands to be equally divided between her brothers and sisters. The plaintiff married Mary, the legatee, and had issue by her. She and her children being dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in the purchase of land, and settled on him for life, as tenant by the curtesy, or have  
148\* the interest of it during his life. \*The Court observed, that if this had been an immediate devise of land, the devisee would have been tenant in tail, consequently the husband would have been tenant by the curtesy. It was, therefore, decreed that the money should be considered as land; and that the plaintiff should have the interest and produce thereof during his life, as tenant by the curtesy. (b)

15. An *equity of redemption* of an estate in fee simple which

(a) Tit. 1. s. 4. (Davis v. Mason, 1 Pet. S. C. R. 503, 508; Green v. Green, 1 Ham. Ohio, R. 244.)

(b) Sweetapple v. Bindon, 2 Vern. 536. Cunningham v. Moody, 1 Ves. 174. Dodson v. Hay, 3 Bro. C. C. 404. S. P.

<sup>1</sup> See LL. *Alabama*, by Toulmin, p. 247; *Kentucky*, Rev. St. Vol. I. p. 44; LL. *Maryland*, by Dorsey, Vol. I. p. 701; *Mississippi*, Rev. St. p. 353, How. & Hutch. ed.; [Rabb v. Griffin, 26 Miss. (4 Cushm.) 579.] *Virginia*, Stat. 1785, Henning's St. at Large. Vol. XII. ch. 62, p. 157, 158. See further, Houghton v. Hapgood, 13 Pick. 154; Robison v. Codman, 1 Sumn. 28.

<sup>2</sup> So, where the wife's lands are sold by order of Court under a process in partition, the husband is entitled to the proceeds of the sale, as tenant by the curtesy, on giving security to account for the principal at her decease, under the statutes of *Pennsylvania*. Clepper v. Livergood, 5 Watts, 115.

is mortgaged in fee, or for years, has been decreed to be subject to curtesy; of which an account will be given hereafter. (a) <sup>1</sup>

16. Some *incorporeal hereditaments*, such as advowsons, tithes, commons, and rents, are liable to curtesy; of which an account will be given under those respective titles.

17. Having stated the different kinds of property which are liable to curtesy, it will now be necessary to inquire *what things are not subject to this right*.

18. *No estates in land are subject to curtesy, but those of inheritance*; for an estate by the curtesy is a *continuation of the inheritance*; and, therefore, there can be no tenancy by the curtesy, unless the children take the inheritance; for it is absolutely necessary that the moment the husband takes as tenant by the curtesy, the inheritance should descend from the wife to her child or children.

19. Lands were devised to Ann Boothby and her assigns for her life; if she married, and had issue male of her body living at the time of her death, then to such issue male and his heirs male forever. Ann Boothby married, had issue, and died in the lifetime of her husband. It was held that the inheritance never having been vested in the wife during her life, her husband could not be tenant by the curtesy. (b)

20. Lands were devised to A and her heirs; if she died before her husband, he to have £20 a year; the remainder to go to the children. The wife died before her husband. The Court said it was a *rule*, in the case of a tenancy by the curtesy, that the estate should come out of the inheritance, and not out of the freehold; therefore the husband was not entitled to curtesy. (c)

21. A woman, tenant in tail, previous to her marriage, conveyed her estate, by lease and release, to trustees, to the use of her husband for life, remainder to herself for life, remainder to the first and other sons of the marriage. The woman died in the \*lifetime of her husband; and it was held \*149 that the husband did not take any estate under the settle-

(a) Tit. 15. c. 3.

(b) Boothby v. Vernon, 9 Mod. 147. See also Roberts v. Dixwell, tit. 38. c. 14. s. 69.

(c) Sumner v. Partridge, 2 Atk. 47. See also Barker v. Barker, 2 Sim. 249.

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[<sup>1</sup> In Missouri, a husband is entitled to curtesy in the equitable estate of his wife Alexander v. Warrand, 17 Mis. (2 Bennett,) 228.]

ment, because it was not competent to the wife to pass the estate by such a conveyance, to the prejudice of her issue, after her death, and that he did not take an estate by the curtesy; because the instant the marriage took effect, the estate was vested in the husband during the joint lives of himself and his wife; consequently, there never was one moment during the coverture when the wife was seised of an estate tail in possession; which was necessary, in order to make the husband tenant by the curtesy. (a)

22. Estates in fee or in tail, which are held in *joint-tenancy*, are not subject to curtesy; of which the reason will be given in that title. (b)

23. Lord Coke says, a man shall not be tenant by the curtesy of a *remainder or reversion expectant upon an estate of freehold*, unless the particular estate be determined during the coverture.<sup>1</sup> But a man is entitled to curtesy of a reversion expectant on an estate for years, because the wife was seised of a freehold. (c)<sup>2</sup>

(24. Where a remainder in fee is devised in contingency, the reversion descends to the heir until the contingency happens; and if the heir is also the devisee for life, this descent does not merge his estate for life, and so destroy the remainder, for that would go to defeat the will. If, therefore, the wife is such devisee for life, the husband will not be entitled as tenant by the curtesy.<sup>3</sup> But if the descent to the wife is not immediate from the devisor, as, for example, if it descended first to his son and heir, and from him to the wife, there is no inconsistency in applying the general rule as to merger, and holding the remainder thereby defeated, and so the husband entitled as tenant by the curtesy; for, in this case, the will is upheld, and the remainder is admitted to be good in its creation, and is only held liable to be destroyed by those accidents to which such estates are in general exposed.<sup>4</sup>)

(a) *Doe v. Rivers*, 7 Term R. 276.

(b) Tit. 18.

(c) 1 Inst. 29. a. *Ante*, c. 1. s. 10.

[<sup>1</sup> See *Tayloe v. Gould*, 10 Barb. Sup. Ct. 388; *Mackey v. Proctor*, 12 B. Mon. 433.]

[<sup>2</sup> So in North Carolina. *Carter v. Williams*, 8 Ire. Eq. 177.]

<sup>3</sup> *Archer's case*, 1 Co. 66; *Plunket v. Holmes*, 1 Lev. 11; 1 Ld. Raym. 28; *Boothby v. Vernon*, 9 Mod. 147.

<sup>4</sup> *Kent v. Harpoole*, 1 Ventr. 306; *Hooker v. Hooker*, Cas. temp. Hardw. 13; *Doe v. Scudamore*, 2 B. & P. 289, 294; *Fearne on Rem.* 502, 503, 5th ed.

25. A man cannot be tenant by the curtesy of lands which are *assigned* to a woman *for her dower*; of which the reasons will be given in the next title.

26. An estate by the curtesy is no more than a *bare estate for life*; nor has this tenant any more privileges than a mere tenant for life.<sup>1</sup> By the custom of Normandy, it was determinable upon the second marriage of the tenant; which, we have seen, is still the case in gavelkind lands.

27. An estate by the curtesy is considered, in many respects, as a continuation of the wife's estate; therefore the husband is entitled to all those rights and privileges which his wife would have had if she were alive, and which were annexed to her estate. (a)

28. *No entry is necessary to complete this estate*; for on the death of the wife, the law adjudges the freehold to be in the husband immediately, as tenant by the curtesy. (b)

\*29. Where an estate, of which a man is tenant by the \*150 curtesy, is charged with the payment of a sum of money; the person entitled to the inheritance can oblige the tenant by the curtesy to keep down the interest, as well as any other tenant for life. (c)

30. The tenant by the curtesy shall be attendant on the lord paramount for the services due in respect of the lands that he holds by this title. (d)

31. If a tenant by the curtesy aliens (by feoffment) in fee, or in tail, or for the life of the grantee, it is a *forfeiture* of his estate; and the person in reversion may, by the Stat. of Westminster 2, c. 24, have a writ of entry, *in consimili casu*. (e)<sup>2</sup>

(a) Walker's case, 3 Rep. 22. b.

(b) Bro. Ab. *Præcipe*, 38. (Witham v. Perkins, 2 Greenl. 400.)

(c) 1 Atk. 606.

(d) 2 Inst. 301. Paine's case, 8 Rep. 36. a.

(e) 2 Inst. 309.

<sup>1</sup> In *Pennsylvania*, the husband's title as tenant of the freehold, does not commence until the death of the wife. *Supra*, ch. 1, § 15, note (1.)

<sup>2</sup> For the law of forfeiture by alienation, in the United States, see tit. 3, ch. 1, § 36, note. In *New Jersey*, it is provided by statute, that an alienation by the husband, of the wife's inheritance, though with a covenant purporting to bind him and his heirs to a warranty, shall neither work a discontinuance of the estate of the wife, nor estop her heirs from claiming the inheritance. *N. Jersey*, Rev. St. 1820, p. 347, 348. See, also, *McKee v. Pfout*, 3 Dall. 486. [*Flagg v. Bean*, 5 Foster (N. H.) 49; *Johnson v. Bradley*, 9 Ired. 362.]

32. Tenants by the curtesy are restrained by the Stat. of Gloucester, 6 Edw. I. c. 1, from barring the heirs of their wives by warranty without assets. (a)

33. A husband does not forfeit his right to an estate by the curtesy, by leaving his wife, and *living in adultery* with another woman. (b)<sup>1</sup>

34. It appears to have been doubtful whether a tenant by the curtesy was *punishable at common law for waste*. It was, therefore, enacted, by the Stat. of Gloucester, 6 Edw. I. c. 5, that a writ of waste might be brought against him, and that he should incur the same penalties for committing waste as any other tenant for life. (c)

35. There is such a privity of estate between the tenant by the curtesy and the heir, that at common law, although both had, as it were, by consent, granted away their estates, yet no action of waste lay against any other than the tenant by the curtesy; nor against him, by any other than the heir at law. By the Statute of Gloucester, c. 5, a remedy is provided for the grantee of the reversion, against a tenant by the curtesy, so long as he continues his estate; or against his assignee. But while the heir keeps his reversion, the tenant by the curtesy is liable to his

(a) Tit. 32. c. 25.

(b) 3 P. Wms. 276. (*Smoot v. Lecatt*, 1 Stew. 590.)

(c) 2 Inst. 145, 301, 353. Sup. p. 120. n.

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<sup>1</sup> This rule of the common law has, in several of the United States, been altered by statute, and made to conform in this respect to the Stat. Westm. 2, c. 34, by which adultery works a forfeiture of dower. See *Indiana* Rev. St. 1843, ch. 28, § 141, p. 441; *Illinois* Rev. St. p. 238, § 11. In *Maryland*, curtesy is forfeited by a conviction of polygamy. LL. *Maryl.* by Dorsey, Vol. I. p. 580. In *Ohio*, it is also forfeited by suffering the land to be sold for the non-payment of taxes, without redemption. *Ohio* Rev. St. 1841, ch. 118, § 66, p. 923. Generally, in the United States, a divorce from the bond of matrimony restores to the wife her lands, free of all claims of the husband, unless she is the guilty cause of the divorce. See *Missouri* Rev. St. 1845, ch. 53, § 8, p. 428; *Arkansas* Rev. St. p. 335, ch. 51, § 13; *Michigan* Rev. St. 1838, p. 339; LL. *R. Island*, 1844, p. 264; *N. York* Rev. St. Vol. II, p. 205, 3d ed.; LL. *North Carolina*, Vol. I. p. 241; *Maine* Rev. St. ch. 9, § 15, 16; *Massachusetts* Rev. St. ch. 76, § 27, 33; *Starr v. Pease*, 8 Conn. R. 541; *Oldham v. Henderson*, 5 Dana, 256; *Vermont* Rev. St. p. 326. In *New Hampshire*, the subject is confided to the discretion of the Court. *N. Hamp. Rev. St.* p. 294. See also LL. *Alabama* by Toulmin, p. 256. *Barber v. Root*, 10 Mass. 260; *Kruger v. Day*, 2 Pick. 316. But this general rule may be controlled by any antenuptial contract. *Babcock v. Smith*, 22 Pick. 61. See further, *Wheeler v. Hotchkiss*, 10 Conn. 225; *Mattocks v. Stearns*, 9 Verm. 326.

action of waste, notwithstanding any  
having provided no remedy for this ca

the statute

36. It appears somewhat doubtful  
curtesy is within the Statute 6 Anne,  
fire. (b)

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ig accidental

(a) 2 Inst. 301. 2 Bac. Ab. 8vo. p. 230.

(b) 1 Inst. 57. a. ii. 1. Tit. 3. c. 2.

## TITLE VI.

## DOWER.

## BOOKS OF REFERENCE UNDER THIS TITLE

- COKE upon LITTLETON, 30—41.  
 BLACKSTONE'S COMMENTARIES. Book II. ch. 8.  
 KENT'S COMMENTARIES. Lect. 55.  
 PARK. On the Law of Dower.  
 BISSET. On Estates for Life. Ch. IV.  
 ROLANDUS à VALLE. *Tractatus de Lucro Dotis*.  
 JACKSON. On Real Actions. Ch. XVI.  
 STEARNS'S Summary of the Law and Practice of Real Actions. Ch. V.  
 CHAMBERS. On Estates and Tenures, p. 96—110.  
 ROPER. On the Law of Property arising from the relation between Husband and Wife. Ch. IX. and Addenda, No. 1.  
 LAMBERT. On Dower.  
 FLINTOFF. On Real Property. Vol. II. Book I. ch. 3.  
 STORY. On EQUITY JURISPRUDENCE. Vol. I. ch. 12.

## CHAP. I.

## ORIGIN AND NATURE OF DOWER.

## CHAP. II.

## OF WHAT THINGS DOWER MAY BE, AND NATURE OF THIS ESTATE.

## CHAP. III.

## ASSIGNMENT OF DOWER AND MODES OF RECOVERING IT.

## CHAP. IV.

## WHAT WILL OPERATE AS A BAR OR SATISFACTION OF DOWER.

## CHAP. I.

## ORIGIN AND NATURE OF DOWER.

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| SECT. 1. <i>Origin of Dower.</i><br>5. <i>Dower at Common Law.</i><br>7. <i>Dower by Custom.</i><br>11. <i>Circumstances required.</i><br>12. <i>I. Marriage.</i><br>14. <i>How proved.</i> | SECT. 15. <i>Effect of Divorces.</i><br>19. <i>II. Seisin of the Husband.</i><br>26. <i>III. Death of the Husband.</i><br>27. <i>Who may be endowed.</i><br>28. <i>Who are incapable of Dower.</i><br>29. <i>Aliens.</i> |
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SECTION 1. The third estate for life, derived from the law, is that which a widow acquires in a certain portion of her hus-



band's real property, after his death, for her support and maintenance. It is called *Dower*, and is derived from the Germans, among whom it was a rule that a virgin should have no marriage portion, but \* that the husband should allot a \* 152 part of his property for her use, in case she survived him.

Thus Tacitus says,—*Dotem non uxor marito, sed uxori maritus offert.* And when the Germans established themselves in the southern parts of Europe, and reduced their customs into writing, they fixed the portion of the husband's lands which he might allot for his wife's dower. The Longobardic code directed that it should consist of a fourth part, the Gothic of a tenth; and in process of time regular forms were invented for the purpose of constituting dower. (a)

2. The Saxons, like all the other German nations, were well acquainted with the custom of dower; for it appears from the laws of King Edmund, that a widow was entitled to a moiety of her husband's property, for her life; but which she forfeited by a second marriage. In the Appendix to Somner's *Gavelkind*, there is a Saxon charter, intituled *Chirographum Pervetustum de Nuptiis contrahendis, et dote Constituendâ*, in which particular lands, together with thirty oxen, twenty cows, ten horses, and ten bondmen, are appointed for the wife's dower. It is not known whether the Conqueror made any alteration in the Anglo-Saxon customs respecting dower; so that it probably continued to consist of a moiety of the husband's lands, upon condition that the widow remained chaste and unmarried. But by the charter of King Henry I. this condition of chastity and widowhood was only required where there was issue. (b)

3. The law of dower appears, however, to have been altered in the reign of King Henry II.; for Glanville states it thus. Every man was bound, both by the civil and ecclesiastical law, to endow his wife at the time of his marriage; either by naming the dower in particular, or by endowing her generally of all his lands. If he endowed her generally, then the wife was entitled to her *dos rationabilis*, which was one third of her husband's freehold. If he named a dower which amounted to more than a third, it was not allowed, but was reduced to a third. Nor was the wife entitled to dower out of any of her husband's

(a) Du Cange Voce Dos. Baluz. Form. vol. 2. 414. 937. Marculp. Form. c. 15.

(b) Lindebrog, Ll. Sax. tit. 7.

subsequent-acquisitions, unless he specially engaged before the priest to endow her of them. (a) And these regulations are exactly similar to those contained in the *Grand Coustumier* of Normandy. (b)

4. Nothing is mentioned in King John's Magna Charta, or the first Charter of Henry III. respecting dower; but in the charters of 1217, and 1224, it is declared that dower should consist 153 \* of a third of all the lands which the husband held during his life, unless the wife had been endowed of a smaller portion at the church door.† *Assignetur autem ei pro dote sua, tertia pars totius terræ mariti sui, quæ fuit sua in vitâ sua, nisi de minori fuerit dotata ad ostium ecclesiæ.* (c)

5. Dower at common law is thus described by Littleton, s. 36. "Tenant in dower is where a man is seised of certain lands and tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth; the wife, after the decease of her husband, shall be endowed of a third part of such lands and tenements as were her husband's at any time during the coverture;<sup>1</sup> to have and to hold the same to the wife in severalty, by

(a) p. 6. c. 1, 2, &c.

(b) c. 101.

(c) Blackst. Charters. 2 Inst. 16.

[† Assignment of Dower *ad ostium ecclesiæ* or *ex assensu patris*, are now abolished by Stat. 3 & 4 Will. 4, c. 105, s. 13.]

<sup>1</sup> In most of the United States, the right of the wife to her dower is the same as is here stated in the text. But as her inchoate title is an existing incumbrance upon the land, it is usual for the purchaser to require a release of her right, upon any sale made by the husband; which is generally done by her joining with him in the deed, with apt words for that purpose. Where this is not done, it is seldom that the widow claims dower in lands sold by the husband, if he has left sufficient assets to respond to his covenant of warranty; because the damages recovered by the grantee will diminish her share of the personalty, and that of her own children also, if she had any by the husband. In several of the States, however, her right of dower is restricted to lands of which the husband died seised. Such is the law of *Vermont*, Rev. St. 1839, ch. 51; and of *New Hampshire*, Rev. St. 1842, ch. 165, § 3, and ch. 205, § 7; and of *Tennessee*, Caruthers & Nicholson's Dig. p. 262; and of *North Carolina*, Rev. St. 1837, ch. 121, p. 612, 613, [but seisin is not complete without registry of the deed under which the title is claimed, *Thomas v. Thomas*, 10 Ire. 123;] and of *Connecticut*, Rev. St. 1838, tit. 25, p. 188; and of *Georgia*, Prince's Dig. 1838, p. 253. In *South Carolina*, the real estate of an intestate is distributed, one third to the widow in fee, and the residue to his children; and if the intestate leaves no lineal descendant nor lineal ancestor, nor brother or sister of the whole blood, or their children, nor brother or sister of the half blood, his widow takes two thirds of the real estate in fee; and in all other cases she takes a moiety. *South Car. Statutes at Large*, Vol. V. p. 162, 163. In *Georgia*, the widow and children of an intestate inherit his estate in equal shares; and if he dies without issue, she inherits the whole. And in all cases, the widow is bound, within one year

metes and bounds, for term of her life; whether she hath issue by her husband or no, and of what age soever the wife be, so as that she be past the age of nine years, at the time of the death of her husband."

6. It has been stated that curtesy is founded on positive institutions; but dower is not only a civil, but also a moral right. Thus Sir Joseph Jekyll says, "the relation of husband and wife, as it is the nearest, so it is the earliest; and, therefore, the wife is the proper object of the care and kindness of the husband. The husband is bound by the law of God and man to provide for her during his life; and after his death the moral obligation is not at an end, but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture, the wife can acquire no property of her own. If before her marriage she had a real estate, this by the coverture ceases to be hers; and the right thereto, while she is married, vests in her husband. Her personal estate becomes his absolutely,

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from the death of her husband, to elect whether she will take under the will, if any, or the statute of distributions, if there is no will, or will claim her dower; and if she does not so elect, she will be presumed to have claimed her dower. Prince's Dig. p. 233, 238, 239, 249, 253. In *Ohio*, the widow is dowerable not only of her husband's legal estates of inheritance, but also "of one third part of all the right, title or interest, that her husband, at the time of his decease, had in any lands and tenements, held by bond, article, lease, or other evidence of claim." Ohio Rev. St. 1841, ch. 42, § 1; *Smiley v. Wright*, 2 Ohio R. 506. But she is held not dowerable of an equitable estate which the husband, in good faith, has aliened. *Derush v. Brown*, 8 Ohio R. 412; nor of lands purchased by him, in his own name, with moneys intrusted to him by another. *Ibid.* In *Missouri*, the common-law right of dower is extended to "leasehold estates for a term of twenty years or more." Missouri Rev. St. 1845, ch. 54, § 1. In *Mississippi*, if there are no children, nor their issue, the widow has one half of the land. *Howard & Hutchinson's Dig.* p. 351. So in *Vermont*, Rev. St. 1839, ch. 51, § 5; and in *Alabama*, *Toulmin's Dig.* p. 886; and in *Arkansas*, Rev. St. 1837, ch. 52, § 21; and in *Illinois*, Stat. Gale's ed. p. 698. [The statute permitting the widow, where a man dies intestate leaving no children or their issue, to inherit one half of the real estate, does not at all affect her right to dower in the other half of the land. *Tyson v. Postlethwaite*, 13 Ill. 732.] In *Pennsylvania*, instead of dower, the widow is admitted to her distributive share of the estate, among the heirs; and if the intestate left issue, she takes one third of the real estate for her life; if no issue, she takes half in the like manner; and in default of known heirs or kindred, she inherits the whole estate, absolutely and forever. *Pardon's Dig.* p. 550, 552, 5th ed. In *Indiana*, the widow of an intestate, in lieu of her dower, may in certain cases take in fee, as an heir; but subject to the claims of his creditors; her share being one third, or one half, or the whole, according to the circumstances stated in the statute. *Indiana Rev. St.* 1843, ch. 28, § 117—121; *post*, tit. 29, ch. 2, note, *ad calc.*

or at least is subject to his control ; so that unless she has a real estate of her own, (which is the case of but few,) she may by his death be destitute of the necessities of life ; unless provided for out of his estate, either by a jointure, or dower. As to the husband's personal estate, unless restrained by special custom, which very rarely takes place, he may give it all away from her. So that his real estate, if he has any, is the only plank she can lay hold of to prevent her sinking under her distress. Thus the wife is said to have a moral right to dower." (a)

154 \* \*7. *Dower by custom* is where a widow becomes entitled to a certain portion of her husband's lands in consequence of some local and peculiar custom. And in cases of this kind the widow cannot waive the provision thereby made for her, and claim dower at common law, because all customs are equally ancient with the common law. (b)

8. Thus by the custom of *gavelkind*, the widow is entitled to a *moiety* of all the lands and tenements which her husband held by that tenure, [and of which he was seised at any time during the coverture.] This was formerly called *free bench*, and is forfeitable by a second marriage, or by the having a bastard child. And it is observable, that this species of dower is exactly similar to that which existed in the time of the Saxons. (c)

9. By the custom of some boroughs, the wife shall have for her dower *all* the tenements that were her husband's ; which is also called *free bench*. (d)

10. By the custom of most manors of which lands are held by copy of court roll, the widows of copyholders are entitled to a certain part, and sometimes to the whole of their husband's lands, as their dower or *free bench*. (e)

11. Littleton's description of dower at common law points out *three circumstances* as absolutely necessary to create a title to dower ; namely, *marriage*, *seisin*, and *death of the husband*.

12. With respect to the *marriage*, it must be between persons capable of contracting together, and duly celebrated ; for it is a maxim of law, *ubi nullum matrimonium, ibi nulla dos* ; and although the marriage be had before the parties are of sufficient age to consent ; yet if the wife be past the age of nine years, at

(a) 2 P. Wms. 702.

(b) 1 Inst. 83. b.

(c) Rob. Gav. 159. 17 Edw. 2. st. 1. c. 16. Lambard Arch. 60.

(d) Lit. s. 166.

(e) Tit. 10. ch. 3.

the time of her husband's death, she shall be endowed, of what age soever her husband be, although he were but four years old. Wherein it is to be observed (says Lord Coke,) that although *consensus, non concubitus, facit matrimonium*, and that a woman cannot consent before twelve years, nor a man before fourteen; yet this inchoate and imperfect marriage, from which either of the parties may, at the age of consent, disagree, shall entitle the wife to dower. Therefore it is accounted in law, after the death of the husband *legitimum matrimonium quoad dotem*.† (a)

13. It has been stated that though a marriage be voidable, yet if it be not avoided in the lifetime of the parties, it cannot be annulled after. And if a marriage *de facto* be voidable by divorce, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*, yet if the husband die before any divorce, then, for that it cannot after be annulled, the wife *de facto* will be endowed. (b)

14. In actions for curtesy or dower, the fact of marriage cannot be tried by a jury, but only by the *bishop's certificate*, upon the plea of *ne unques accouplé in loyal matrimony*. Because the direct jurisdiction in question concerning the legality of marriage belongs to the ecclesiastical courts; and the sentences of those courts, on this head, are in general conclusive to the temporal courts.<sup>1</sup> (c)

15. A *divorce propter sævitiam et metum* is no bar to dower,

(a) 1 Inst. 32. a. Id. 33. a. (b) Tit. 5. c. 1. 1 Inst. 33. b.

(c) Bract. 302. a. Dyer, 368. b. Robbins v. Crutchley, 2 Wils. R. 122. Ilderton v. Ilderton, 2 H. Black. 145.

[† The common law on the subject of marriages has been altered by various acts, which have been repealed by those now in force; viz. 4 Geo. 4, c. 76; 5 ib. c. 32; 6 ib. c. 92; 11 G. 4, & 1 Will. 4, c. 18; \* but the law of Scotland continues in \* 155 the particulars above noticed according to the common law. Where the parties *elope* and go to Scotland, and marry there according to the law of that country, and return immediately afterwards, the wife will be entitled to dower. 1 Ersk. Prin. of the Law of Scotland, 62; Compton v. Bearcroft, Bull. N. P. 113; 2 Hagg. 443, 444; ib. 54; Brook v. Oliver, Rolls, 1759, and Bedford v. Varney, Chancery, 1762, cited 2 Hagg. 376, (n.); Ex parte Hall, 1 Ves. & Bea. 112, 114. Marriages of English subjects celebrated *bonâ fide* in foreign countries, according to the law of those countries, will also entitle the widows to dower. Ilderton v. Ilderton, 2 Hen. Black. 145. See also 2 Hagg. 390, 395, 437; also, 1 Roper, Husband and Wife, Jacob's ed. 334, and addenda.]

<sup>1</sup> In the United States, where there is no episcopal secular jurisdiction, the fact of marriage is tried in the same manner as other issues of fact. And see Park on Dower, 12. Hardr. 64, 65. The affirmative sentence of any Court having jurisdiction of the question of marriage or no marriage, is conclusive of the question. 1 Greenl. Evid. § 484, 493, 544, 545. 2 Greenl. Evid. § 461.

because it does not dissolve the bond of matrimony; but is only a permission to the parties to live separate, in order that the wife may be secure from the husband's cruelty. (a)

16. Lord Coke says, a divorce on account of adultery is no bar to dower, because it does not dissolve the marriage, but only separates the parties *a mensâ et thoro*; and the marriage still remains in force. In Roll. Ab. is the following passage:—"If the wife be divorced for adultery, which does not dissolve the bond of marriage, by the canon law, nor of our church in this realm, but is only *a mensâ et thoro*, yet this shall bar her of her dower."<sup>1</sup>

Lord Coke's doctrine, however, is supported by a decision of the Court of Common Pleas, in 2 James.

There is also another case where a woman, who had been divorced *a mensâ et thoro*, claimed her dower in Chancery. And Sir T. Trevor, M. R., said: "As to dower, whether you are entitled to it, go to law, there being no impediment, and therefore, as to that, the bill must be dismissed." But it does not appear from the report whether the divorce was for adultery. (b)

(a) 1 Inst. 32. a.

(b) 1 Inst. 32. a. Roll. Ab. Tit. Dower P. (Elopement, pl. 13.) Stowell's case, Godb. 145; Noy, 108. Shute v. Shute, Prec. in Ch. 111.

<sup>1</sup> A divorce *a vinculo matrimonii* bars the claim of dower; for to entitle the party claiming dower, she must have been the wife at the death of the husband. But in case of such divorce for the adultery of the husband, it is provided in the statute law of those States which authorize such divorce, that the right of dower shall be preserved, or that a reasonable provision be made for the wife, out of the husband's estate, by way of indemnity for the loss of her dower, and of her husband's protection. 4 Kent, Comm. 54. In some of the United States, it is expressly enacted that a divorce from the bonds of matrimony for the misconduct of the wife, shall bar her right of dower. New York, Rev. St. Vol. II. p. 27, 3d. ed.; Arkansas, Rev. St. 1837, ch. 52, § 8. Whether such divorce for any other cause is intended to have that effect in those States, is not known to have been decided. [A divorce, obtained by the wife for the adultery of the husband, bars her right of dower. Wait v. Wait, 4 Barb. Sup. Ct. 192.] In Missouri and Illinois, the language of the statute is general, that if a woman is divorced from her husband, for her own fault or misconduct, she shall forfeit her dower; without expressing whether the provision is to extend to divorces *a mensâ et thoro*, or is to be restricted to divorces from the bonds of matrimony. Missouri Rev. St. 1845, ch. 54, § 9. Illinois Rev. St. 1837, p. 254, Gale's ed. In Massachusetts, the wife is dowable on being divorced *a vinculo matrimonii* for adultery of the husband; or upon his being sentenced to the penitentiary for seven years or more. Mass. Rev. St. 1836, ch. 76, § 32, and ch. 102, § 8. In Maine, she is dowable upon a similar divorce "for his fault;" Maine Rev. St. ch. 144, § 10; and in Maryland, upon his conviction of bigamy. Maryland St. 1809, ch. 138, § 7. [In Indiana, see Comly v. Strader, 1 Smith, 75; S. C. 1 Carter, 134; McCafferty v. McCafferty, 8 Blackf. 218. See, also, Levins v. Sleator, 2 Greene, (Iowa,) 604.]

17. It has, however, been enacted by the Statute of Westm. 2, c. 34, that if a woman *elopes* from her husband, and *lives in adultery*, she will thereby lose her dower. (a) <sup>1</sup>

18. A divorce, *causâ præcontractus, consanguinitatis, affinitatis* or *frigidity*, bars the wife of dower, because these dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again. But the marriage must be dissolved in the lifetime of the husband. (b)

19. The *second circumstance* required to the existence of dower † is, that the husband should be *seised* some time *during the coverture* of the estate whereof the wife is dowerable.<sup>2</sup> There is, however, no necessity for a seisin in deed, as in the case of curtesy; for a *seisin in law* will be sufficient, otherwise it would be in the husband's power, either by his negligence or his malice, to defeat his wife of that subsistence after his death, which the law has provided for her; and she cannot enter to gain a seisin in her own right, as her husband may do in lands descended to her, in order to entitle himself to curtesy. (c) <sup>3</sup>

20. Where the ancestor dies seised, and the heir being married, dies without making an actual entry on the lands, his widow shall notwithstanding be endowed; for, by the descent of the land upon the heir, he acquired a seisin and freehold in law, though not in deed. It would be the same if, soon after the death of the ancestor, a stranger had entered on the land and abated; for between the death of the ancestor, and the entry of the abator, there was a space of time during which the heir had a seisin in law. If, however, the heir had married after the entry of the abator, and had died without making an entry, his widow

(a) *Infra*, c. 4.

(b) 1 Inst. 33. a.

(c) Tit. 1. Perk. s. 366. Lit. s. 448.

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<sup>1</sup> Such is understood to be the common law in the United States; but in some of the States this provision has been expressly enacted.

[† The late act for the amendment of the law of dower does not extend to the dower of any widow who shall have been, or who shall be married on or before Jan. 1, 1834. Stat. 3 & 4 Will. 4, c. 105, s. 14.]

<sup>2</sup> In *Vermont, New Hampshire, Tennessee, North Carolina, Connecticut, and Georgia*, the husband must have died seised. See *ante*, § 5, note; [Walters v. Jordan, 13 Ired. 361.]

[<sup>3</sup> The mere fact that a husband at his death had possession of land is such a seisin as will entitle the widow to dower, as against his representatives and all who do not claim by superior title. *Torrence v. Carbry*, 27 Miss. (5 Cushm.) 697; *Henry's case*, 4 Cush. 257.]

would not be entitled to dower; because the seisin in law 157\* which he had \*acquired, upon the death of the ancestor, was divested by the abatement before the marriage; so that the heir had neither seisin in law, nor in deed, during the coverture. (a)

21. Where the lands are conveyed to a married man by a deed deriving its effect from the Statute of Uses, his wife will be entitled to dower, though the husband does not enter; because by the operation of that statute a seisin in deed is transferred. (b) †

22. If a man makes a *lease for life*, reserving rent to him and his heirs, then marries and dies, his wife shall not be endowed of the reversion, because there was no seisin in deed, or in law, of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple. But if a man makes a *lease for years*, reserving rent, then marries and dies, his wife shall be endowed, because he continues to be seised of the freehold and inheritance. (c)

23. If a person devises lands to his executors for payment of debts, and after his debts paid to his son in tail, and the son marries, and dies before the debts are paid, his wife shall have dower; because the estate of the executors is only a chattel interest, and the freehold vested in the son on the death of the father. But the wife's dower will not commence till the debts are paid. (d)

24. It is laid down by Lord Cōke, that of a *seisin for an instant*, a woman shall not be endowed. This position is thus explained by Sir W. Blackstone:—"The seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not entitle the wife to dower, for

(a) Plowd. 371. (Galbraith v. Green, 13 S. & R. 85.) Perk. 367. (b) Tit. 11. c. 3.

(c) 1 Inst. 32. a. (Eldredge v. Forrestal, 7 Mass. 253. Fisk v. Eastman, 5 N. Hamp. 240. Otis v. Parshley, 10 N. Hamp. 403.)

(d) 1 Inst. 41. a. Manning's case, 8 Rep. 96. a. 2 Vern. 404.

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[ † But though the seisin at law of the husband without actual entry will entitle the wife to dower, (Co. Lit. 29. a. Lit. s. 681,) still this seisin as regards the dower of women married before or on the 1 Jan. 1834, must be of a legal and not an equitable estate. 2 Bro. C. C. 630; 2 Atk. 526; Infra, tit. 12, ch. 2, s. 16, &c.]



the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof." (a) <sup>1</sup>

25. Sir J. Jekyll has also said, that a woman is not entitled to dower out of an instantaneous seisin. The cognizee of a fine is not so seised as to give his wife a title to dower; nor in the \*case of a use,<sup>2</sup> has the widow of a trustee any \*158 claim to dower from such a momentary seisin in her husband. (b) †

(a) 1 Inst. 31. b. 2 Bl. Comm. 181. Broughton v. Randall, Cro. Eliz. 503.

(b) 1 Atk. 442.

<sup>1</sup> The true question in these cases is whether the seisin was legally beneficial to the husband. If it was, though for ever so short a time, the right of dower attaches to it. But if it was in the husband only for the purpose of transmission to another, and not absolutely, it does not. The case of Broughton v. Randall, Cro. El. 503; 1 Roper on Husb. & Wife, 369, where father and son were hanged at the same time, but one of them lived a moment longer than the other, is an example of the former. So where A conveyed to B, and B at the same time conveyed the same land to C, it was held that B's widow was entitled to dower. Stanwood v. Dunning, 2 Shepl. 290; Gammon v. Freeman, 1 Redingt. 243. An example of the latter is where land is conveyed in fee, and at the same time mortgaged, to secure the purchase-money either to the grantor or to a stranger who has advanced it. Clark v. Munroe, 14 Mass. 351; Holbrook v. Finney, 4 Mass. 566; Bullard v. Bowers, 10 N. Hamp. 500; Maybury v. Brien, 15 Pet. 21. [Smith v. Stanley, 37 Maine, 11.]

If the husband aliens the land on the day of his marriage, the wife will still be entitled to dower. Stewart v. Stewart, 3 J. J. Marsh. 48. And if before the marriage, but in contemplation of it, he should make a fraudulent conveyance, whether absolute or in mortgage, for the purpose of defeating the right of dower, it will be no bar to her right. Littleton v. Littleton, 1 Dev. & Batt. 327; Killinger v. Reidenhauer, 6 S. & R. 531. [Brewer v. Connel, 11 Humph. 500.]

If the husband, before the marriage, in good faith contracts to convey the land, it shall be free of dower, if it be conveyed accordingly after the marriage. 7 Ves. 436; 14 Ves. 591. [A widow is not entitled to dower in lands conveyed away by her husband before marriage, though the conveyance be fraudulent and void as against his creditors. Whithed v. Mallory, 4 Cush. 138.]

<sup>2</sup> The principle is now settled, that the wife's right of dower attaches only to the beneficial seisin of the husband. Therefore the wife of a trustee is entitled to dower in the trust estate no further than the husband had a beneficial interest therein; and if she attempts to recover it at law, equity will restrain her, and punish her in costs. Hinton v. Hinton, 2 Ves. 631; Noel v. Jevon, 2 Freem. 43; 4 Kent, Comm. 43. See further, *post*, ch. 2, § 25; Small v. Procter, 15 Mass. 495. If the husband is seised to the use of himself and others, and his interest cannot be particularly ascertained, and is subsequent to that of the other parties, his wife cannot be endowed until the other uses are satisfied. McCaulay v. Grimes, 2 G. & J. 318.

[† The observations in the preceding sections on the legal seisin of the husband, now

26. The *last circumstance* required to the existence of an estate in dower is the *death of the husband*, by which the wife's estate is consummate.<sup>1</sup> It is generally said, that nothing but the natural death of the husband will give a title to dower; though there are some authorities to prove that banishment by abjuration of the realm, or by [act of] parliament, which is a civil death, will have the same effect. (a)<sup>2</sup>

27. With respect to the *persons capable* of being endowed, all women who are natural born subjects, and have attained the age of nine years, are, by the common law, entitled to dower; although their husbands should be but four years old. And Lord Coke says, if a man marries a woman only seven years old, and afterwards aliens his land, and the wife attains the age of 159 \* \* nine years, and then the husband dies, she shall be endowed; for though she was not absolutely dowable at the time of her marriage, yet she was conditionally dowable, if

(a) 1 Inst. 33. b. 182. b.

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only apply in England to the husbands of women married before, or on the 1st day of January, 1834, for by the late Statute 3 & 4 Will. 4, c. 105, sect. 2, 3, widows married since that day, *are* entitled to dower out of equitable estates; the following are the words of the act. That when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint-tenancy) then his widow shall be entitled in equity to dower out of the same land. Sect. 3. That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced. No mention is made of gavelkind tenure in the above act. See 3 & 4 W. c. 27.]

<sup>1</sup> Reputation, in the family, is *prima facie* evidence of the death of the husband. *Cochrane v. Libby*, 6 Shepl. 39. So, in general, is the grant of letters of administration. *Thompson v. Donaldson*, 3 Esp. 63; *Succession of Hamblin*, 3 Rob. Louis. R. 130; *Newman v. Jenkins*, 10 Pick. 515; *Moons v. De Bernales*, 1 Russ. 301. So is his absence for seven years, without intelligence concerning him. See 1 Greenl. on Evid. § 41, 550. As to the presumption of survivorship, where two persons perish in the same calamity, see 1 Greenl. on Evid. § 29, 30.

[<sup>2</sup> Before the inchoate title of the wife to dower becomes vested by the death of the husband, any regulation of it may be made by the legislature, though its operation is in effect, to divest her of her right of dower. *Moore v. New York*, 4 Sandf. Sup. Ct. 456.]

she attained the age of nine years before the death of her husband. (a)

28. Notwithstanding the favor which the common law shows to widows, yet there are *some cases* in which women are *disabled* from having dower.

29. *Alien women* are not generally capable of acquiring dower, for the same reason that an alien man cannot be tenant by the curtesy.<sup>1</sup> But by the *Lex Coronæ*, an alien queen is entitled to dower. And in consequence of a petition from the Commons, an act of parliament was made in 8 Henry V. not printed among the statutes, by which all alien women who from thenceforth should be *married to Englishmen by license from the king*, are enabled to have dower, after their husbands' death, in the same manner as English women. (b)

30. If an alien woman be *naturalized* by act of parliament, she then becomes entitled to dower out of all the lands whereof her husband was seised during the coverture. And where an alien woman is created a *denizen*, she becomes entitled to dower, out of all the lands whereof her husband was seised at the time when she was created a denizen; but not out of any lands whereof he was seised before, and which he had aliened. (c)<sup>2</sup>

(a) 1 Inst. 33. a.

(b) Tit. 5. c. 1. s. 27. Jenk. Cent. 1. ca. 2. Rot. Parl. vol. iv. 128. 130.

(c) 1 Inst. 31. b. 33. a. Menvill's case, 13 Rep. 23.

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<sup>1</sup> In those of the United States in which an alien is permitted to hold lands, alienage, whether of the husband or wife, would be no impediment to the title to dower. See *ante*, tit. 1, § 37, note. In others it is expressly enacted, that alienage of the wife shall be no bar to her title. *Massachusetts*, Rev. St. ch. 60, § 14. [See Statute, 1852, ch. 29.] *Maine*, Rev. St. ch. 95, § 7; *Maryland*, St. 1813, ch. 100; *Michigan*, Rev. St. 1838, p. 265; *New Jersey*, Elmer's Dig. p. 143. See, also, *Indiana*, Rev. St. 1843, ch. 28, § 105. In *New York*, alienage of the husband is no bar to dower, if the wife be an inhabitant of the State. N. York, Rev. St. Vol. II. p. 26, 3d ed. In *Missouri*, it seems that alienage of either husband or wife is no bar. *Missouri*, Rev. St. 1845, ch. 54, § 1; *Stokes v. Fallon*, 2 Missouri R. 32. See, also, *New Hampshire*, Rev. St. 1842, ch. 129, § 4, and ch. 165, § 3, and ch. 205, § 7; *Arkansas*, Rev. St. 1837, ch. 52, § 2, and ch. 7, § 1; *Sutliff v. Forgey*, 1 Cowen, 89; 5 Cowen, 713.

<sup>2</sup> So, if she were naturalized. *Priest v. Cummings*, 16 Wend. 617.

## CHAP. II.

## OF WHAT THINGS DOWER MAY BE, AND NATURE OF THIS ESTATE.

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| <p>SECT. 1. <i>Estates in Fee Simple.</i><br/>         3. <i>Estates Tail.</i><br/>         6. <i>Qualified or Base Fees.</i><br/>         7. <i>Estates in Coparcenary and Common.</i><br/>         8. <i>Remainders and Reversions after Estates for Years.</i><br/>         10. <i>Equities of Redemption of some kind.</i><br/>         11. <i>Incorporeal Hereditaments.</i><br/>         12. <i>Where a Widow has an Election.</i><br/>         13. <i>What Things are not liable to Dower.</i><br/>         14. <i>Estates in Joint-tenancy.</i><br/>         15. <i>Estates held by Copartners in Trade.</i></p> | <p>SECT. 17. <i>Estates not of Inheritance.</i><br/>         18. <i>Wrongful Estates.</i><br/>         20. <i>Lands assigned for Dower.</i><br/>         24. <i>Uses, Trusts, and Mortgages.</i><br/>         26. <i>Where Dower and Curtesy cease with the Estate.</i><br/>         27. <i>Nature of this Estate.</i><br/>         29. <i>The Dowress entitled to Emblements.</i><br/>         30. <i>Restrained from Alienation.</i><br/>         32. <i>And from Waste.</i><br/>         34. <i>Not subject to her Husband's Incumbrances.</i><br/>         35. <i>In some Cases Dower depends upon the Election of third Persons.</i></p> |
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SECTION 1. A woman is entitled to dower out of all the lands whereof her husband was seised *in fee simple*, at any time during the coverture; † and also of all the

[† This now relates only to women married before, or on the 1st day of January, 1834, Stat. 3 & 4 Will. 4, c. 105, s. 14, for by that statute it is enacted,—S. 4. That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will.

Sect. 5. That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements, to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Sect. 6. That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

Sect. 7. That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Sect. 8. That the right of a widow to dower shall be subject to any conditions, restrictions, or directions, which shall be declared by the will of her husband, duly executed as aforesaid.

profits<sup>1</sup> arising out of those lands, \* such as mines, minerals, &c., and in a modern case, the Court of Common Pleas certified to the Lord Chancellor, that dower was due of *mines* of coal and lead, wrought during the coverture; whether by the husband, or by lessees for years, paying pecuniary rents, or rents in kind; and whether the mines were under the husband's own land, or had been absolutely granted to him, to take the whole *stratum* in the land of others. But that dower was not due of mines or *strata* unopened, whether under the husband's land or the soil of others. (a)

(a) *Stoughton v. Leigh*, 1 Taunt. 409. (See *post*, § 32.)

Sect. 9. That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Sect. 10. That no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land, not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

By sect. 11. It is provided that nothing therein contained shall prevent any Court of Equity from enforcing any covenant or agreement, entered into by or on the part of any husband, not to bar the right of his widow to dower, out of his lands or any of them.

And by sect. 12. It is enacted, that nothing therein contained shall interfere with any rule of Equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows, in satisfaction of dower, are entitled to priority over other legacies.]

<sup>1</sup> By the law of *Massachusetts*, a widow is not dowable of wild lands, not connected with a cultivated farm, nor used for procuring fuel, or timber, for the purposes of the farm; nor of lands which were wild when sold by the husband, but have since been reduced to a state of cultivation. *Massachusetts*, Rev. St. ch. 60, § 12; *Conner v. Shepherd*, 15 Mass. 164; *White v. Willis*, 7 Pick. 143; *Webb v. Townsend*, 1 Pick. 21; *Shattuck v. Gragg*, 23 Pick. 88. So is the law of *Maine*, Rev. St. ch. 95, § 2; *Mosher v. Mosher*, 3 Shepl. 371; *Kuhn v. Kaler*, 2 Shepl. 409. In *New Hampshire*, by Rev. St. 1842, ch. 165, § 4, the widow is not dowable unless the lands, while owned by the husband, were "in a state of cultivation," or were used or kept as a wood or timber lot, and occupied with some farm or tenement owned by him. And lands are considered in a state of cultivation when they are not in their original state by nature, or, after having been cleared and worked, have not reverted to a similar state. *Johnson v. Perley*, 2 N. Hamp. R. 56. [See also *Meserve v. Meserve*, 19 N. H. 240.]

[In *Georgia* a widow is entitled to dower in the wild and uncultivated lands of which her husband was seised during coverture, at common law, and of such as he may be seised and possessed at the time of his death, under the statute. *Chapman v. Schweder*, 10 Geo. 321. Under the ordinance of 1787, a widow is entitled to dower as at common law, in all the lands of which her husband was seised during coverture. *May v. Rumney*, 1 Mann. (Mich.) 1.]

2. A woman is dowable of the *profits* of a mill, a park, a dove-house, or fishery. So of the profits of courts, fines, and heriots, and also of shares in the navigation of the River Avon. (a)

3. A woman is also entitled to dower out of all estates whereof her husband is *seised in tail*, general or special, if her issue be capable of inheriting them. And Lord Coke says, albeit the wife be a hundred years old, or that the husband, at his death, was but four or seven years old, so as she had no possibility to have issue by him; yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot judge that impossible, which by nature was possible. And for the husband's being of such tender years, he hath *habitu*, though he hath not *potentiam* at that time; and, therefore his wife shall be endowed. (b)

4. Dower is an incident so inseparably annexed to an 162\* *estate \* tail*, that it *cannot be restrained by any proviso or condition whatever*. And although the estate tail should determine by the death of the husband, without issue capable of inheriting it, yet the wife shall be endowed; because dower is a condition *tacitè* annexed to the gift of every estate tail. (c)

5. Where a tenant in tail covenanted to stand seised to the use of himself for life, remainder to the use of his eldest son in tail; and afterwards married and died; it was resolved that his widow should be endowed; because when a tenant in tail limits an estate for his own life, he has executed all the power he had; and the remainder is merely void; so that he continues tenant in tail as before. (d)

6. A woman is dowable of a *qualified fee*, as long as it continues; therefore, in the case of a limitation to A and his heirs, tenants of the manor of Dale, the widow of A would be entitled to dower. It is the same of a *base fee*, so that if a tenant in tail conveys his estate by fine to A and his heirs, by which he acquires an estate to him and his heirs, as long as the tenant in tail has heirs of his body, the wife of A will be entitled to dower against her husband's heirs. (e)

(a) 1 Inst. 32. a. 1 Ves. jun. 652. (b) Lit. s. 53. 1 Inst. 40. a.

(c) Lit. s. 53. 1 Inst. 224. a. *Id.* 31. b. Tit. 5. c. 2.

(d) Blithman's case, Cro. Eliz. 280. Tit. 2. c. 2. s. 1.

(e) Tit. 1. Plowd. 557.

7. Widows are dowable of estates held in *coparcenary* and in *common*; of which an account will be given under those titles.<sup>1</sup>

8. A woman is not entitled to dower out of an estate in *remainder* or *reversion* [*expectant on an estate of freehold*, because the husband has no seisin.<sup>2</sup>† But a woman is dowable of a reversion expectant on a *term for years*, because the husband is seised of the freehold.<sup>3</sup> (a)

9. Thus, if a man before his marriage makes a lease for years, reserving rent, his wife will be entitled to a third of the land for her dower; and also to a third of the rent as incident to the reversion. If no rent be reserved on the lease, then although the widow may recover a third of the reversion, yet the judgment will be with a *cesset executio* during the term. In some cases, a Court of Equity will assist the dowress in removing the term; and in others not; of which an account will be given in a subsequent title. (b)

10. Where lands are mortgaged for a term of years only, a woman will be entitled to dower out of the *equity of redemption*. \*But if lands are mortgaged in fee before \* 163 the marriage, the wife will not be entitled to dower at law, because the husband has not the legal estate.‡<sup>4</sup> (c)

(a) 1 Inst. 32. a.

(b) 1 Inst. 32. a.

(c) Tit. 15. c. 3.

[† The law remains unaltered by the late act 3 & 4 Will. 4, c. 105, as to estates in reversion.]

[‡ *Vide supra*, ch. 1, s. 25, note.]

<sup>1</sup> But the widow is bound by a partition made by her husband, or by process of law, which is valid as against him; and, therefore, must take her dower in the part thus assigned to the husband or his heirs in severalty. *Potter v. Wheeler*, 13 Mass. 504.

<sup>2</sup> But where the reversioner, in such case, mortgaged in fee, the mortgagee was held estopped to deny his seisin, in a writ of dower brought against him by the widow of the reversioner. *Nason v. Allen*, 6 Greenl. 243.

<sup>3</sup> *Blood v. Blood*, 23 Pick. 80; *Otis v. Parshley*, 10 N. Hamp. 403; *Dunham v. Osborn*, 1 Paige, 634; *Blow v. Maynard*, 1 Leigh, 30; *Fisk v. Eastman*, 5 N. Hamp. 240; [*Young v. Tarbell*, 37 Maine, 509; *Hastings v. Stevens*, 9 Foster (N. H.) 564; *Henry's case*, 4 Cush. 257; *Weir v. Humphries*, 4 Ire. Eq. 50.]

<sup>4</sup> This doctrine of the common law was abrogated in England, by Stat. 3 & 4 W. 4, c. 105, by which the wife's right of dower is attached to the equitable as well as the legal estates of the husband. See *ante*, ch. 1, s. 25, note.

In most, if not all, of the United States, the legal estate is regarded as still in the mortgagor, as to all persons except the mortgagee and his assigns; and, therefore, the wife is held dowable *at law*, against all persons claiming under the husband, except those claiming under a mortgage deed, made prior to the marriage; and this, whether the mortgage was for years or in fee. And as against such prior mortgagee and his

11. A widow is dowable of several *incorporeal hereditaments*; such as advowsons, tithes, commons, offices, franchises, and rents; as will be shown under those respective titles; [but she is not entitled to dower out of a personal annuity granted to her husband and his heirs.] (a).

12. There are some cases in which a *widow has a right of election*, as to the property out of which she is dowable. Thus, if the husband *exchanges* his lands for others, his widow shall have her election to be endowed, either of the lands given, or of those taken, in exchange; because her husband was seised of

(a) Stat. 3 & 4 Will. 4. c. 105. s. 1. Title 28. c. 2. s. 16.

assigns, she is dowable *in Equity*. And though she joined with her husband in a subsequent mortgage, releasing her claim of dower, yet this release enures to the benefit of the mortgagee and his assigns only, and not to a stranger. *Smith v. Eustis*, 7 Greenl. 41. As against the mortgagee, in such case, her remedy is by bill in Chancery, upon payment of her just proportion of the sum due upon the mortgage; or, if her husband were the grantee of a part only of a large tract previously under mortgage, then upon payment of her just proportion of the mortgage money, according to the relative value of the two parcels of land. And the proportion payable, in that case, by the husband's part of the land, is such proportion as the value of that parcel bears to the value of the whole tract; and of the sum thus found, the widow must pay that proportion which the present value of an annuity for her life, equal to the income of her dower, bears to the value of the whole parcel conveyed to her husband. *Carll v. Butman*, 7 Greenl. 102; [*Niles v. Nye*, 13 Met. 135; *Mantz v. Buchanan*, 1 Md. Ch. Decis. 202; *Chew v. Farmer's Bank*, 9 Gill. 361.] And see *Cass v. Martin*, 6 N. Hamp. 25. And where, as in the former case, she joins with her husband in a mortgage, releasing her right of dower, and she is admitted to her dower in Equity, the proportion of the mortgage debt which she is to pay, is adjusted according to the value of her life-estate in the land assigned for dower, compared with the value of the residue of the land, including the reversion in the part so assigned to her. *Van Vronker v. Eastman*, 7 Met. 157. See further, *Russell v. Austin*, 1 Paige, 192. If the premises are sold under a mortgage in which the wife has joined with her husband, she is still entitled, in Equity, to claim her share in the surplus proceeds, as for her dower. But if the husband purchased the land, giving to the vendor, at the same time, a mortgage to secure the purchase-money, and afterwards he releases his equity to the mortgagee, the wife's right of dower is entirely gone; for though the debt was paid by the release, yet by the same act, *uno flatu*, the title became absolutely vested in the mortgagee, without leaving a beneficial seisin for a moment in the husband. *Jackson v. Dewitt*, 6 Cowen, 316. See 4 Kent, Comm. 43—45, and cases there cited; *Gibson v. Crehore*, 5 Pick. 146; *Barker v. Parker*, 17 Mass. 564. See Law Reporter for July, 1849, Vol. II. p. 165, N. S.

Where there are successive mortgages, the first of which is made to secure the purchase-money, by the husband alone, and the second is for another debt, in which the wife joins, releasing her dower; and the husband afterwards pays off the first mortgage, the wife is entitled to her dower, subject to the second mortgage. *Walker v. Griswold*, 6 Pick. 416.

If lands are sold by the husband, with the wife's release of dower, she is held entitled in equity to a part of the fund, in lieu of dower. *Maccubbin v. Cromwell*, 2 H. & Gill, 243.



both during the coverture.<sup>1</sup> And there are some other cases where the widow has the right of election, which will be stated hereafter. † (a)

13. Having enumerated the different kinds of property which are liable to dower, I shall now examine *what things are not subject to this claim.*<sup>2</sup>

14. Estates held with other persons in *joint-tenancy* are not subject to dower, the reason of which will be given under that title. (b)

(15. Estates held by *partners* may or may not be liable to dower, according to the circumstances of the case. It is a well-established rule that neither of the partners can have an ultimate and beneficial interest in the capital stock or property, until the partnership debts are paid, and the account settled. Whenever, therefore, real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or as tenants in common, it vests in them and their respective heirs in trust for the purposes of the partnership, until those purposes are accomplished. Until then, the land has in equity all the attributes of personal property, held in partnership and in trust; and the widow of a deceased partner cannot have dower, nor can the heir take by descent, until the claims of the partnership creditors, and of the surviving partner, are adjusted and settled.<sup>3</sup>)

(a) Co. Lit. 31. b. Perk. s. 319. F. N. B. 149. u.

(b) Stat. 3 & 4 Will. 4. c. 105. s. 2. (Maybury v. Brien, 15 Pet. 21.)

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[ † See Stat. 3 & 4 Will. 4, c. 105, s. 9, 10, *supra*, p. 160, note.]

<sup>1</sup> [The word "exchange" used in the Rev. Stat. of New York, in exclusion of the wife from dower in lands exchanged by her husband, has the common-law meaning, and there must be a mutual grant of equal interests in the respective parcels of land, the one in consideration of the other. *Wilcox v. Randall*, 7 Barb. Sup. Ct. 633.]

[<sup>2</sup> A widow is not entitled to dower in lands conveyed away by her husband before marriage, although such conveyance was fraudulent and void as against his creditors. *Whithed v. Mallory*, 4 Cush. 138. Where the grantor of an estate on condition enters for condition broken, the widow has no dower. *Beardslee v. Beardslee*, 5 Barb. Sup. Ct. 324. A lease of lands for ninety-nine years, renewable forever, is a chattel interest, and not an estate in lands in which dower can be claimed. *Spangler v. Stanler*, 1 Md. Ch. Decis. 36.]

<sup>3</sup> 3 Kent, Comm. 37—39; Collyer on Partnership, by Perkins, § 135, 136, 154, 155, 156, and cases there cited; *Dyer v. Clark*, 5 Metc. 562, 579, 580; *Howard v. Priest*, Ibid. 582; *Burnside v. Merrick*, 4 Metc. 537; *Sigourney v. Munn*, 7 Conn. 11; *Hoxie v. Carr*, 1 Sumn. 173; *Phillips v. Phillips*, 1 My. & K. 649; *Crawshay v. Maule*, 1 Swanst. 495, 522; *Broom v. Broom*, 3 My. & K. 443; 1 Story on Eq. § 674; 2 Ibid.

(16. But though the estate were thus purchased by the partners, and with partnership funds, yet the circumstances may have been such as to preclude such implied trust, and to show that they intended to hold the property to their respective, separate and private uses; as, where there is a provision to that effect in the articles of partnership, or an express agreement to the like effect at the time of the purchase, or where their respective proportions of the purchase-money are charged to the respective partners in their several accounts with the firm, thereby making a division and distribution of so much of the capital fund, without injury to the rights of creditors. In such cases, the wife will be entitled to dower.<sup>1</sup>)

17. An estate in dower is a continuation of the husband's estate,<sup>2</sup> and is, therefore, only incident to estates of inheritance not to estates which the husband holds *for his life*. And it is not only necessary that the husband should have an estate of inheritance, to entitle the wife to dower, but the estate must also be *simul et semel* in him.<sup>3</sup> (a)

18. A widow is not dowable of a *wrongful estate*. So that if a tenant in tail discontinues in fee, afterwards marries, disseises the discontinuee and dies seised, his wife shall not have dower; because the issue is remitted to the ancient entail; and the estate which the husband had during the coverture, was wrongful. (b)

19. So where a man having title to lands, enters and dis-

(a) Hooker v. Hooker, tit. 16. c. 6. Bates v. Bates, tit. 32. c. 24.

(b) 1 Inst. 31. b. Fitz. N. B. 149. Tit. 29. c. 1.

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§ 1207, 1207 a. If lands so held in partnership are sold to one having actual or constructive notice that they belong to the partnership stock, they will be chargeable in his hands with the existing partnership debts, though he had no notice that any such debts in fact existed. Hoxie v. Carr, *supra*. [Goodburn v. Stevens, 5 Gill, 1; S. C. 1 Md. Ch. Decis. 420.]

<sup>1</sup> Dyer v. Clark, 5 Met. 562, 579; 3 Kent, Comm. 37—39; Story on Part. § 93, 94; Greene v. Greene, 1 Ohio R. 244.

<sup>2</sup> The title in dower, as it arises by operation of law upon the death of the husband, falls properly under the head of title by descent. See 4 Kent, Com. 373, note a; 1 Inst. 18, b. note 106; 2 Am. Law Mag. 39—67; Pemberton v. Hicks, 1 Binn. 1; [Lawrence v. Brown, 1 Selden, N. Y. 394.]

<sup>3</sup> Hence it is that the widow is not dowable of an estate *pour autre vie*; for it was not descendible, by the common law, but belonged, by right of occupancy, to him who first entered after the death of the tenant for another's life, and is now made distributable, as part of the personalty, by statutes, both in England and America. Ante, tit. 3, ch. 1, § 43—46; Park on Dower, 48, 49; Gillis v. Brown, 5 Cowen, 388.

seises the tenant, and dies seised, and his heir enters, by which he is remitted to the ancient right, the widow of the disseisor is not entitled to dower, because her husband's estate was wrongful.<sup>1</sup> (a)

\*20. A widow is not dowable of lands *assigned to* \*164 *another woman in dower*. Thus if the ancestor of a married man dies, and he endows the widow of such ancestor of one third of the lands which descended to him, and dies; his widow will only be entitled to a third of the remaining two thirds; for it is a maxim of law, as ancient as Glanville, that *dos de dote peti non debet*. The reason of which is, that when the heir endows the widow of the ancestor, that defeats the seisin which he acquired by the descent of the lands to him. So that the widow is in of the estate of her husband, and the heir is considered as having never been seised of that part.<sup>2</sup> (b)

21. In the same manner, if a woman on whom lands descend endows her mother, afterwards marries, has issue, and dies in the lifetime of her mother; her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed; because the daughter's seisin was defeated by the endowment. (c)

22. The rule of *dos de dote* is only applied where dower is actually assigned; for if no dower be assigned, it does not take place.<sup>3</sup>

23. Lands subject to a title to dower were devised to a person in fee; he died, leaving a widow, who sued at law for dower and recovered a third part of the whole; without any regard to the title of dower in the widow of the testator. (The deviser's widow also sued at law for her dower, while the other action was pending, but did not proceed any further therein. After-

(a) Idem. (b) 1 Inst. 31. a. Bustard's case, 4 Rep. 122. Glanv. Lib. 6. c. 17.

(c) Bro. Ab. Curtesy, 10.

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<sup>1</sup> But where the tenant claims under the husband's seisin, he is estopped from denying the seisin of the husband, or from setting up a better title in a third person. Bancroft v. White, 1 Caines, 185; Kimball v. Kimball, 2 Greenl. 226; and see Nason v. Allen, 6 Greenl. 243, *supra*, § 8, note (2); [Pledger v. Ellerbe, 6 Rich. Eq. 266. But he may deny that the seisin was such as gave her a right to dower. Gammon v. Freeman, 31 Maine, (1 Red.) 243.]

<sup>2</sup> See *post*, § 28, (1.) [Manning v. Laboree, 33 Maine, (3 Red.) 343.]

[<sup>3</sup> Elwood v. Klock, 13 Barb. Sup. Ct. 50.]

wards the devisee's widow filed her bill in Chancery against the deviser's executors and his widow, to compel the executors to pay off an outstanding mortgage, and to enjoin the widow's action for dower, on the ground that certain estates devised to her were intended in lieu of dower.) The Lord Keeper held, that as the testator's widow had not recovered dower, it was to be laid out of the case; and that the dower of the devisee's widow was not to be looked upon as *dos de dote*. (a)

24. A widow was never allowed dower of a *use*; nor is she now entitled to dower out of a *trust estate*;¹ and where an estate is conveyed to a man by way of *mortgage*, it is not subject to dower. (b)

(25. So far as dower is a legal right, and is to be pursued by legal remedies, it is obvious, that the estates in respect of which it is claimed, can be such only as have existence in the contemplation of a court of law. It never could become a question, therefore, whether the wife of a *cestui que trust* could have a title of dower at law. But a question which has been the subject of much agitation, and upon which, though now settled, the rule was for a long time in a vacillating state, was whether Courts of Equity, having in most cases applied the rules and incidents of legal estates to the ownership of the trust, should or should not follow that principle in relation to dower, and give the wife of a *cestui que trust* an equitable equivalent for her dower at law, out of the trust estate.) (c)

(a) *Hitchens v. Hitchens*, 2 Vern. 403. (b) Tit. 11, 12, 15. (c) *Park on Dower*, 123, 124.

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¹ But the widow of a *trustee* was dowable, by the common law; though Equity would restrain her by injunction, if he had no beneficial interest in the land. 4 Kent, Comm. 42; Perk. sec. 392; 1 Roper, Husb. & Wife, 353; 1 Roll. Abr. 678, pl. 36. After the Statute of Uses, 27 H. 8, the widow of the feoffee to *uses* could not be endowed, because he had but an instantaneous seisin. Stearns on Real Actions, [281.] And it is now held that the wife of a trustee is not dowable, in Equity, of the trust estate. *Robison v. Codman*, 1 Sumn. 129; *Powell v. Monson*, 3 Mason, 347, 364, 365; *Cooper v. Whitney*, 3 Hill, 101; *Cowman v. Hall*, 3 Gill & Johns. 398; *Noel v. Jevon*, 2 Freem. 43; *Bevan v. Pope*, Ibid. 71. In *Pennsylvania*, it has been held otherwise. *Shoemaker v. Walker*, 2 S. & R. 556. In most of the United States, the case of trusts is expressly provided for by statute, the courts being empowered, in some States only in cases of trusts created by will, but in others, in all cases, to appoint new trustees upon the death, refusal, or resignation of any person holding lands in trust; and the estate being declared to be vested in the new trustees thus appointed. In such cases, the title of the wife to dower seems necessarily to be excluded.

(Before the statute of uses, the Courts of Equity, although, in many cases, they made the estate of the *cestui que use* subject to the incidents of legal estates, yet, for some reasons which can now only be conjectured, did not think fit to give dower of an use. Perhaps the courts, considering such interests only as arose by *contract* the proper subjects of their jurisdiction, looked upon dower as a right arising solely by implication of law, and, therefore, not within the pale of equitable cognizance. Chief Baron Gilbert states as a reason, that the chancery would not allow the feoffors to be seised to anybody's use but those that were particularly named in the trust; and this does not seem altogether improbable, looking at the use, as Courts of Equity did then look at it, as the creation of the parties, and, therefore, to be solely governed by their expressed intent. However this may be, when, in consequence of the construction which had been put upon the statute of uses, chancery trusts had been introduced in practice, conveyancers, regarding them as equivalent to uses before the statute, and governed by the same rules, adopted the plan of putting the legal estate in trustees, in cases where it was an object to avoid the attachment of a title of dower, and the efficacy of this mode was so little doubted of, that it became a very general practice. Here arose the difficulty; for, in the meantime, the doctrine of trusts had become the subject of progressive consideration in Courts of Equity, and they had by degrees formed a system of equitable jurisdiction, with regard to the estate in trust, in which they had been chiefly governed by analogy to the rules of law, and under which, (the same objection not occurring,) they had made the trust subject to *curtesy*. Upon an attentive perusal of the cases, it will be found, that after much hesitation, whether to prefer consistency of principle, or security of titles, the latter motive at length gained the ascendancy, the existence of an anomalous distinction being regarded as of less importance than the extensive mischief which would have been produced by disregarding a practice which had been applied to perhaps half the titles in the kingdom. Some judges have, indeed, endeavored to vindicate, upon principle, the rule which denies dower of a trust, but the consideration above stated has been the substantial and predominating ground upon which

that rule is now decisively established without danger of further discussion.) (a)<sup>1</sup>

(a) Park on Dower, 123—126.

<sup>1</sup> The origin of this apparently inconsistent rule, is thus explained by Lord Redesdale:—"The difficulty in which the Courts of Equity have been involved with respect to dower, I apprehend, originally rose thus:—They had assumed, as a principle in acting upon trusts, to follow the law; and according to this principle, they ought in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and, consequently, to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been, acting, on the footing of dower, upon a contrary principle, and had supposed, that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion, if Courts of Equity had followed their general rule, with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy." *D'Arcy v. Blake*, 2 Sch. & Lef. R. 388, 389.

In several of the United States, the common law, in this particular, has been altered by statutes, and the wife is made dowable of equitable estates, under various modifications. In some, she is dowable generally of estates of which any one was seised to the husband's use. Such seems to be the law in *Rhode Island*, Rev. St. 1844, p. 188; and in *New Jersey*, *Dennis v. Kiernan*, Elm. Dig. p. 147, 4 Kent, Comm. p. 46; and in *North Carolina*, Rev. St. Vol. I. p. 614; and in *Tennessee*, Rev. St. 1836, p. 265. In *Indiana*, Rev. St. 1843, ch. 28, § 80—84, it is limited to such equitable estates as the husband had at the time of his decease. In some other States, her right extends only to those equitable estates of inheritance, which, if legal, would entitle her to dower by the common law. Such are the statutes of *Virginia*, Tate's Dig. p. 175; *Alabama*, Toulmin's Dig. p. 247, § 9; and *Mississippi*, How. & Hut. Dig. p. 353. In *Kentucky*, Rev. St. Vol. I. p. 572, note 2, the wife may have dower in any equitable fee, where the interest of the husband was sufficient to entitle the chancellor to decree a conveyance to him of the legal estate. By the statute of *Illinois*, Rev. St. 1839, p. 698, § 49, it is enacted that "equitable estates shall be subject to the widow's dower, and all real estate of every description contracted for by the husband in his lifetime, the title to which may be completed after his decease." [This means equitable estates of inheritance. *Davenport v. Farrar*, 1 Scam. 316, in argument. See also *Stribling v. Ross*, 16 Ill. 172. A widow is entitled to dower of land in which her husband had an equitable interest subject to any lien that may exist thereon for purchase-money unpaid. *Stewart v. Beard*, 4 Md. Ch. Decis. 319; *Blair v. Thompson*, 11 Gratt. 441; *Thompson v. Thompson*, 1 Jones's Law, N. C. 430; *Firestone v. Firestone*, 2 Ohio, N. S. 415.] In *Ohio*, the widow is dowable of the interest which her husband had at the time of his decease in any lands "held by bond, article, lease, or other evidence of claim." Ohio Rev. St.

\*26. It has been stated that in the case of an estate \*165 tail, the curtesy of the husband, and the dower of the wife continue; though the estate tail be determined. But there are several cases where the curtesy and dower cease upon the determination of the estate. 1. Where the fee is evicted by a *title paramount*, both curtesy and dower necessarily cease. 2. Where the seisin of the husband is *wrongful*, and the heir is remitted; by which the wrongful estate is determined; the right to dower ceases. 3. Where the donor *enters for breach of a condition*, the right to curtesy and dower is defeated. 4. Where a person has a *qualified or base fee*, the right to curtesy and dower ceases, when the estate is determined. 5. Where an estate in *fee simple* is made *determinable* upon some particular event, if that event happens, curtesy and dower cease with the estate. (a)

27. The interest which widows acquired by way of dower was seldom greater than for their own lives, unless it was otherwise stipulated at the time of the marriage. And in England dower does not appear to have ever consisted of more than an estate for life.<sup>1</sup>

28. Before the abolition of military tenures, the dowress was attendant on the heir, or whoever else was entitled to the reversion, for the third part of the services; and still she holds of the heir by fealty; the assignment of dower by the heir being a species of subinfeudation, not prohibited by the statute *Quia Emptores*, because the heir does not depart with the fee.<sup>2</sup> (b)

(a) Lit. s. 393. *Ante*, s. 18. Tit. 13. c. 2. Seymour's case, 10 Rep. 98. a. Buckworth v. Thirkell, tit. 38, c. 17.

(b) Gilb. Uses, 357.

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1842, ch. 42, § 1; Derush v. Brown, 8 Ohio, R. 812. And such seems to be the law of *New York*, in regard to any equitable interest of the husband, in lands of which he died equitably seised. N. York Rev. St. Vol. II. p. 163, 169, 3d ed.; 4 Kent, Comm. 43—47. See further, *McCartee v. Teller*, 2 Paige, 511; *Smiley v. Wright*, 2 Ohio R. 507; *Brewer v. Vanarsdale*, 6 Dana, 204; *Robinson v. Miller*, 1 B. Monroe, R. 88, 91; *Bailey v. Duncan*, 4 T. B. Monr. 262; *Graham v. Graham*, 6 T. B. Monr. 562; *Stevens v. Smith*, 4 J. J. Marsh. 65; *Dean v. Mitchell*, *Ibid.* 451; *Kelly v. Mahan*, 2 Yeates, 515; *Hamlin v. Hamlin*, 1 Applet. 141.

[<sup>1</sup> The possibility of right to dower may be released, but it cannot be the subject of grant or assignment, nor is it an interest in real estate. *Moore v. New York*, 4 Selden, N. Y. 110. Before assignment a right of dower may be reached by a creditor's bill. *Stewart v. McMartin*, 5 Barb. Sup. Ct. 438. See Post, ch. 3, § 1, note, p. \*168.]

<sup>2</sup> The contradiction between this passage, and the last sentence in § 20, *supra*, where

29. At common law, a dowress could not *devise* corn which she had sown; nor did it go to her personal representatives, but became the property of the reversioner; because the widow, being entitled to an immediate assignment of dower, after the death of her husband, if the lands happened to be sown at that time, she had the benefit of it; which made her case different from that of other tenants for life, who are seldom put into possession of lands that are sown. It was, however, provided by the Statute of Merton, 20 Hen. III. c. 2, that a dowress might dispose by will of the growing corn; otherwise that it should go to her executors. (a) <sup>1</sup>

30. Tenants in dower were under the *same restraints respecting alienation* as other tenants for life. But where a dowress alienated by feoffment, and the feoffee died seised, whereby the entry of the person in reversion was taken away, he could  
166 \* have \* no writ of entry *ad communem legem*, until after the decease of the tenant in dower; and then the warranty, which at that time was usually inserted in all deeds, barred the reversioner, if he was heir to the dowress. To remedy this, the Statute of Gloucester, 6 Edward I. c. 7, provided, that upon the *alienation in fee*, or for life, of a tenant in dower, she shall forfeit her estate; and the heir shall have a writ of entry *in casu proviso*, in the lifetime of the dowress. (b)

31. By the Statutes 11 Henry VII. c. 20, † and 32 Henry VIII. c. 36, it is declared that no feoffment, fine, recovery, or warranty,

(a) 2 Inst. 80.

(b) 2 Inst. 309.

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the heir is said never to have been seised, is only apparent, and not real. The author is here speaking of *seisin diverso intuitu*. Where lands of inheritance are carved into different estates, the tenant of the freehold in possession, and those in remainder or reversion are equally *in* the seisin of the fee. But in opposition to what may be termed the *expectant* nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the *actual* seisin of the lands. Butler's note 217 to 1 Inst. 266, *b*. The latter seisin is only entrusted to the heir, so far as the dowress is concerned; his seisin, in fact, being only for the purpose of transferring it to her. But his ultimate or expectant seisin of the reversion is that which he is said not to depart with.

<sup>1</sup> This statute seems to have been generally regarded as common law in the United States, though in some of them this provision has been expressly enacted. See *N. York*, Rev. St. Vol. II. p. 29, 3d ed.; *Rhode Island*, Rev. St. 1844, p. 192; *North Carolina*, Rev. St. Vol. I. p. 615; *Arkansas*, Rev. St. 1837, ch. 52, § 50; *LL. Kentucky*, Vol. I. p. 575; *Virginia*, Tate's Dig. p. 176. [In *Delaware*. See *Layton v. Butler*, 4 Harring. 507.]

[† Except as to lands in settlement made before the passing of the Stat. 3 & 4 Will. 4, c. 74, (s. 16, 17,) the above act is repealed.]



by tenant in dower, shall create a discontinuance of the inheritance, or take away the entry of the heir, or person in reversion; but that all such acts shall operate as a forfeiture of her estate. (a)

32. Tenants in dower are *prohibited from committing* any kind of *waste*.<sup>1</sup> But it was lately held by the Court of Common Pleas, that if land assigned for dower contained an open mine of coal, or lead, the dowress might work it for her own benefit.<sup>2</sup> (b)

33. It is, however, somewhat doubtful whether dowresses be within the Statute 6 Ann., respecting accidental fire. (c)

34. The widow holds her dower discharged from all *incumbrances*, created by her husband after the marriage; † because upon the husband's death, the title of the wife being consummate, has relation back to the time of the marriage, and to the seisin which the husband then had; both of which precede such

(a) Tit. 36. c. 10.

(b) *Ante*, s. 1.

(c) 1 Inst. 57. a. ii. 1.

<sup>1</sup> Tenant in dower is entitled to estovers, as any other tenant for life. But these can be used only on the dower land, or for purposes connected with its proper occupation. *White v. Cutler*, 17 Pick. 248. See *ante*, tit. 3, ch. 1, § 17, n. In *New Hampshire*, the dowress is entitled to take fuel to burn in her dwelling-house, though it be not on the land. N. Hamp. Rev. St. 1842, ch. 165, § 7. As to Waste, see *ante*, tit. 3, ch. 2.

<sup>2</sup> It is not necessary that the husband should have worked the mines up to the time of his death; nor that the working should have been continued by the heir. *Stoughton v. Leigh*, 1 Taunt. 402, 410; *Park on Dower*, 116. And though the openings which had been wrought by the husband have been abandoned and partially filled up in his lifetime, the dowress may work them. *Coates v. Cheever*, 1 Cowen, R. 460, 465, 474, 477. If the course of working a quarry has been by breaking, progressively, a portion of the surface of the ground, and working down to a certain depth, she may continue it in that method. *Billings v. Taylor*, 10 Pick. 460. So she may penetrate new seams, or sink new shafts. *Findlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear*, 1 Rand. 253.

[The husband of a tenant in dower is not liable for mere permissive waste after the death of his wife, and the surrender of his possession. *Dozier v. Gregory*, 1 Jones's Law, (N. C.) 100; but he commits waste by removing from the premises a building erected thereon by himself. *Ibid*. Where dower is assigned in wholly unimproved, and unproductive town lots, and in a tract of unimproved woodland, the widow may sell timber growing on the woodland, sufficient to raise money necessary to pay taxes already due, and that have become a lien on the land, and to pay an agent's compensation in making the sales, and such sale is not waste. *Crockett v. Crockett*, 2 Ohio, (N. S.) 180.]

[† The law is now altered except as it respects the dower of women married before or on the 1st day of January, 1834. The charges and incumbrances of the husband are now effectual against the dower of the wife married since the above-mentioned period. Stat. 3 & 4 Will. 4, c. 105, s. 5, *vide supra*, p. 160, note.]

incumbrances. And dower is even protected from distress, for a debt contracted by the husband to the crown, during the marriage. (a)

[35. The title to dower may, *in some cases, depend upon the election of third persons.*

The widow is *primâ facie* entitled to be endowed of a rent charge; but if, before distress and avowry made, the husband die, and the heir brings a writ of annuity, which is a mere personal remedy, and recovers judgment on it, or proceeds  
167 \* no \* farther than filing a declaration, the heir's election is bound, and the rent charge will be converted into personal annuity. But if before declaration or avowry by the heir, the widow recover against him in a writ of dower, her right will be established. (b)

36. Again, where the husband, previously to the title of dower attaching, has by contract given the tenant or other person an option of purchasing the estate, and such option is exercised either before or after the husband's death, it will convert the estate into personality, and defeat the widow's right to endowment.] (c)

(a) 1 Inst. 46. a. 4 Rep. 65. a. 1 Inst. 31. a. Fitz. N. B. 150.

(b) Co. Lit. 144. b. 145. Fitz. N. B. 152. a.

(c) 7 Ves. 436. Townley v. Bedwell, 14 Ves. 591.

## CHAP. III.

## ASSIGNMENT OF DOWER, AND MODES OF RECOVERING IT.

SECT. 1. <i>Necessity of an Assignment.</i>	SECT. 23. <i>Effect of an Assignment of</i>
2. <i>Who may assign Dower.</i>	<i>Dower.</i>
6. <i>How it is to be assigned.</i>	26. <i>Actions for recovering Dower.</i>
18. <i>Remedies against an im-</i>	27. <i>May be obtained in Chan-</i>
<i>proper Assignment.</i>	<i>cery.</i>

SECTION 1. Upon the death of the husband the right to dower, which the wife acquired by the marriage, becomes consummate; but unless the precise portion of land which she is to have is particularly specified, as was formerly sometimes done, she cannot enter till dower is assigned to her; for she might in that case choose whatever part of the lands she pleased, which would be injurious to the heir. The widow has therefore *no estate* in the lands of her husband *till assignment*;<sup>1</sup> for the law casts the freehold on the heir, immediately upon the death of the ancestor. (a)

2. With respect to the persons whose duty it was to assign dower, *the heir*, in common cases, as lord of the manor, and \*who was to create the tenure, assigned dower. If \*169 there was any dispute as to the quantity of land assigned,

(a) 2 Bl. Comm. 132. Gilb. Ten. 26.

<sup>1</sup> And therefore her right cannot be taken in execution for her debt; nor leased; for it lies only in action, until assignment. *Gooch v. Atkins*, 14 Mass. 378; *Cox v. Jagger*, 2 Cowen, 638; *Weaver v. Crenshaw*, 6 Ala. R. 873; *Croade v. Ingraham*, 13 Pick. 33; *Nason v. Allen*, 5 Greenl. 479. [But it may be reached by a creditor's bill. *Stewart v. McMartin*, 5 Barb. Sup. Ct. 438. It cannot be aliened. *Blair v. Harrison*, 11 Ill. 384. Nor be taken on execution. *Summers v. Babb*, 13 Ib. 483. Nor be assigned or sold. *Lamar v. Scott*, 4 Rich. Law, 516. But she may make such a contract in regard to it, as equity will enforce. *Potter v. Everitt*, 7 Ired. Eq. 152. Being a right in real property, it cannot be released or conveyed by parol. *Keeler v. Tatnell*, 3 Zab. 62.] Nor has she such an interest in her husband's land of which she is dowable, as to prevent her removal as a pauper from the parish in which the land lies. *Rex v. Northweald Bassett*, 2 B. & C. 724. But in *Connecticut*, it seems, she is regarded as a tenant in common with the heirs, until her dower is set out in severalty; from which it would follow that her right is capable of being conveyed or taken, as an estate of freehold. *Stedman v. Fortune*, 5 Conn. 462.

it was determined by the *pares curiæ*, in the Court Baron; but the suit might be removed to the county court, and also to the king's court.

(3. Though the *heir be within age*, yet the assignment by him is good; subject only to be corrected, if excessive, by a writ of admeasurement of dower.<sup>1</sup>)

4. Regularly no person can assign dower who has not a *freehold estate* in the land. But where a *disseisor*, *abator*, or *intruder*, assigns dower, it is good,<sup>2</sup> and cannot be avoided; unless they are in of such estates by fraud and covin of the widow, to the intent that she may be endowed by them, or recover dower against them; for in that case the assignment may be avoided by the entry of the real owner. (*a*)

5. The reason why such an assignment of dower shall be good is, because the widow having a right to dower, she might have compelled the disseisor, abator, or intruder, as terre-tenants, to assign dower to her; and was not obliged to wait till the heir thought proper to reënter, or sue for the recovery of his right. But where the heir or other tenant of the land refuses to assign dower, and the widow is obliged to resort to the courts of law to obtain an assignment, it is made by the sheriff. (*b*)

6. With respect to *the manner* in which dower ought to be assigned, the rule is, that where the property is capable of being severed it must be by *metes and bounds*; and if the sheriff does not return seisin by metes and bounds, it is ill. But where no division can be made, the widow must be endowed in a special and certain manner. As of a *mill*, a widow cannot be endowed by metes and bounds, nor in common with the heir; but she may be endowed, either of the third toll dish, or of the entire mill, for a certain time. (*c*)

(7. If the *husband has aliened* the land to two or more in severalty, the dower is to be assigned in each distinct parcel of the land. And so, in like manner, if he has aliened to one, and the grantee has afterwards conveyed to others, in several parcels. For though this may impair the value of the dower, it does not

(*a*) 1 inst. 35. a. 357. b. (*b*) 1 Inst. 35. a. 357. b. Perk. 894. 1 Inst. 34. b. (*c*) 1 Inst. 32. a.

<sup>1</sup> 1 Roll, Abr. 137, 631; Gore v. Perdue, Cro. El. 309; Stoughton v. Lee, 1 Taunt. 402; Jones v. Brewer, 1 Pick. 314; [Cormick v. Taylor, 2 Carter, (Ind.) 336.]

<sup>2</sup> For he is in of the husband. Parker v. Murphy, 12 Mass. 485.

diminish the proportion in quantity. And in such cases it will be assigned in the portion of the land which does not include the beneficial improvements of the purchaser, where this may conveniently be done.)<sup>1</sup>

8. It was held by the Court of Common Pleas, in a late case, that dower may be assigned of *mines*, either collectively with other lands, or separately of themselves; that it should be assigned by metes and bounds, if practicable, otherwise either by a proportion of the profits, or separate alternate enjoyment of the whole, for short proportionate periods. (*a*)

9. Dower was assigned by metes and bounds, because it was a tenancy of the heir, and like all other lands in tenure ought to be separated from the demesnes of the manor. The right to have an assignment of dower by metes and bounds may, however, be waived by the widow; and in that case an assignment in \*common will be good. But an assignment \*170 by the sheriff must be by metes and bounds, if it can be done. (*b*)

10. An assignment by metes and bounds can only take place where the husband is seised in severalty; for where he is seised *in common* with others, his widow cannot be endowed by metes and bounds; for she being in *pro tanto* of her husband's estate, must take it in the manner in which he held it. (*c*)

11. Lord Coke says an endowment by metes and bounds, according to common right, was more beneficial to the widow than to be endowed against common right; for there she shall hold the land charged, in respect of a charge made after her title to dower. (*d*)

12. The assignment of dower must be of part of the lands whereof the widow is dowable; for an assignment of land whereof she is not dowable, or of a rent issuing out of such lands, is no bar of dower; because a right or title to a freehold estate cannot be barred by a *collateral satisfaction*. But a rent issuing out of the land whereof a woman is dowable may be assigned for dower. And if a tenant in tail assigns a rent out of

(*a*) *Ante*, c. 2. s. 1.

(*b*) *Gilb. Uses*, 356. *Coots v. Lambert*, 9 Vin. Ab. 256. *Rowe v. Power*, 2 Bos. & Pull. N. R. 1.

(*c*) 1 Inst. 32. b. 9 Vin. Ab. 256.

(*d*) 1 Inst. 32. b. ii. 2.

<sup>1</sup> *Fosdick v. Gooding*, 1 Greenl. 30; *Leggett v. Steele*, 4 Wash. 305; *Coulter v. Holland*, 2 Harringt. 330; *Potter v. Wheeler*, 13 Mass. 504.

the land intailed for dower, not exceeding the yearly value of such dower, it will bind the issue in tail. (a)

13. If an assignment and grant of lands be made to a woman for a term of years, *in recompense of her dower*, this will not bar her of dower, because she has not such an estate as if she had been endowed; namely, an absolute estate for life. It is the same if she accepts a rent for years in allowance of her dower, or for the life of him who assigns it. These rents will not bar her of dower, because she has not the same estate in them as in her dower. (b)

14. The assignment of dower *must also be absolute*; and not subject to be defeated by any condition, nor lessened by any exception or reservation. For the widow comes to her dower in the *per*, by her husband, and is *in*, in continuance of his estate, which the heir or terre-tenant is but a minister, or officer of the law, to carve out to her. Therefore such conditions or reservations are totally void, and her estate discharged from them; or else the estate assigned with such conditions is no bar to her recovery of dower, in an action. But where the lands were leased for years before the marriage, the assignment of 171 \* dower is made with a proviso that the tenant for years shall not be disturbed. (c)

15. Dower may be, and was usually assigned by the heir, by a *parol* declaration<sup>1</sup> that the widow shall have such particular lands for her dower; or else that she shall have a third part of all lands whereof her husband died seised. (d)

16. In some cases a woman shall have a *new assignment* of dower. As where she is evicted out of the lands assigned to her, she shall be endowed of a third of the remainder. (e)

(17. Respecting the wife's right to dower in the *increased value*

(a) Turney v. Sturges, Dyer 91. Vernon's case, 4 Rep. 1. a. 9 Vin. Ab. 261.

(b) 9 Vin. Ab. 258. 2 And. 31. Hob. R. 153.

(c) 1 Inst. 34. b. Wentworth v. Wentworth, Cro. Eliz. 450. Wheatley v. Best, Cro. Eliz. 564. (d) 1 Inst. 5. a. Booth v. Lambert, Sty. 276. (e) Bustard's case, 4 Rep. 122. a.

<sup>1</sup> The reason why a parol assignment is valid, is, that it is not a conveyance of title, the widow holding her estate by law, and not by contract, and therefore it is not within the Statute of Frauds. She requires nothing but to have her part distinguished by metes and bounds. Conant v. Little, 1 Pick. 189; Pinkham v. Gear, 3 N. Hamp. 153; Shattuck v. Gragg, 23 Pick. 88; Johnson v. Neil, 4 Ala. R. 166; Baker v. Baker, 4 Greenl. 67. But a parol assignment does not bind the widow until it is accepted. Johnson v. Morse, 2 N. Hamp. 48; [Boyer v. Newbanks, 2 Carter, (Ind.) 388]

of the land, subsequent to the husband's decease, or his alienation of it to a stranger, some distinctions have been taken which should here be noted. The value may have been increased, either by lasting improvements made by the heir, after the husband's decease; or by such improvements made by the purchaser, after the alienation of the husband; or by circumstances irrespective of either, and connected only with the general growth and prosperity of the neighborhood or country. It is true that the improvements, however made, are attached to the soil and become inseparably part of the freehold; and, therefore, upon general principles, there seems no reason why they should not go with the land to the dowress, as well as to any other alienee, or as they would have reverted with the land to the husband, upon condition broken, were he still alive. And hence it has uniformly been held, that the widow shall be endowed of *lasting improvements made by the heir*; for he is not considered as having been seised of that part of the estate assigned to her in dower; and her seisin is only a continuance of that of the husband. The reason sometimes assigned for this is, that it was the heir's own folly to make the improvements, before assigning the dower; but though this may be so, yet it does not affect the general principle.<sup>1</sup>

The same general doctrine prevails in regard to the increased value of the premises resulting from other and *extraneous causes*, unconnected with any improvements actually made upon the land; and accordingly the wife has one third part of the land assigned for her dower, with the benefit of all this enhanced value of that part, existing at the time of the assignment.<sup>2</sup>

17 a. But in regard to the *improvements made by the alienees of the husband*, an *exception* was for a long time admitted in England, in favor of the alienees; their improvements being excluded in the computation of value, upon the endowment of the wife. The reason assigned for this exception was, that as the alienee could recover against the heir only the value of the land as it was at the time of the conveyance, he would lose the value of his improvements, if the widow should be allowed her

<sup>1</sup> Park on Dower, 256, 257; Perk. § 328, 329; Powell v. Monson, 3 Mason, R. 347, 365—370; 4 Kent, Comm. 66; Parker v. Parker, 17 Pick. 236. [See Purrington v. Pierce, 38 Maine, 447.]

<sup>2</sup> Ibid.

dower in them.<sup>1</sup> But this *reason* has been considered not satisfactory, both in England and in America, though with different results.

In a late case in the *Queen's Bench*, this exception was upon full consideration *overruled*; and it was held by all the judges that, on common law principles, the wife was entitled to a third in value of the land, estimating the value as it was at the time of the assignment, although it had been conveyed away by the husband in his lifetime; and improved in value by buildings erected thereon by the alienee after the conveyance and before the assignment of the dower.<sup>2</sup> But in the *United States*, this *exception* is fully recognized and *admitted*, on grounds of *public policy and convenience*, for the encouragement of alienations, and to promote the general prosperity and improvement of the country; and the widow's right of dower, as against the alienees of the husband, is generally, if not universally, limited to the value of the premises, exclusive of the improvements made upon the land by the purchaser and those claiming under him.<sup>3</sup>

18. Where the sheriff makes an *improper assignment* of dower, it will be set aside by the Court of Common Pleas, or the Court of Chancery; and he will be punished.<sup>4</sup>

19. Thus where the sheriff returned that he had assigned to the demandant, for her dower of a house, the third part of each chamber; and had chalked it out for her. This was held an idle and malicious assignment; and the sheriff was committed for it, as he ought to have assigned to her certain chambers or rooms.<sup>5</sup> (a)

(a) Abingdon's case, cited in Palm. 264.

<sup>1</sup> Park on Dower, 256, 257; Perk. § 328; Co. Lit. 32, a.; 4 Kent, Comm. 65, 66; Powell v. Monson, 3 Mason, R. 369.

<sup>2</sup> Doe d. Riddell v. Gwinnell, 1 Ad. & El. 682, N. S.

<sup>3</sup> Powell v. Monson, 3 Mason, R. 347, 365-370; Gore v. Brazier, 3 Mass. 544; Catlin v. Ware, 9 Mass. 218; Thompson v. Morrow, 5 S. & R. 289; Hale v. James, 6 Johns. Ch. R. 258; 4 Kent, Comm. 65, 66; Waters v. Gouch, 6 J. J. Marsh. 591; Taylor v. Brodrick, 1 Dana, R. 347; [Carter v. Parker, 28 Maine, (15 Shep.) 509; Manning v. Laboree, 33 Ib. (3 Red.) 343; Simonton v. Gray, 34 Ib. (4 Red.) 50; Bowie v. Berry, 1 Md. Ch. Decis. 452; Summers v. Babb, 13 Ill. 484.]

<sup>4</sup> [An assignment to a widow of a portion of the land in fee, equal in value to her dower in the whole will be set aside. Wilhelm v. Wilhelm, 4 Md. Ch. Decis. 330.]

<sup>5</sup> Such an assignment, with the right of common use of the hall and passage-ways for access to the rooms, would have been good. White v. Story, 2 Hill, N. Y. R. 543.



20. In another case the sheriff was committed for refusing to make an equal allotment of dower; and for taking sixty pounds to execute the writ. An information was also ordered against him. (a)

21. A bill was brought by the heir to be relieved against a fraudulent assignment of dower by the sheriff; because a third part of the lands was assigned, without taking notice of a coal work that was on the estate; the plaintiff offering the defendant one entire third, both of land and coal work, by way of rent-charge on the whole. The Court ordered that she should accept thereof; or that otherwise a new assignment of dower should be made. (b)

[22. When the assignment of dower is made not by the sheriff but by the heir, if he were of full age, and under no disability when he made the assignment, although the assignment exceeded the widow's third of the value of the estate, he will not be relieved by a court of law. (c)

But if the *heir were under age*, when he assigned dower, he will be protected against the consequences of excessive assignment, and may have his *writ of admeasurement of dower*. (d)<sup>1</sup>

But he cannot defeat the assignment of dower by entry.] (e)

\* 23. The widow acquires an estate of *freehold* by the \* 172 assignment, *without livery* of seisin;<sup>2</sup> because dower is due of common right; and the assignment is an act of equal notoriety. (f)

24. As soon as dower is assigned, the widow holds by the institution of the law, and is in of the *estate of her husband*; so that after assignment she is considered as holding by an infeudation immediately from the death of her husband; therefore the heir is not considered as having ever been seised of that part of his ancestor's estate, whereof the widow is endowed. (g)

(a) Longvill's case, 1 Keb. 743. (b) Hoby v. Hoby, 1 Vern. 218.

(c) Gilb. Dower, 380. Sloughton v. Leigh, 1 Taunt. 404, 412. (F. N. B. 148. G. H.)

(d) Gilb. Dower, 382. Fitz. N. B. 148. G. H.

(e) Gilb. Dower, 388.

(f) 1 Inst. 85. a.

(g) Lit. s. 393. Gilb. Uses, 356, 395. (Windham v. Portland, 4 Mass. 384, 388. Jones v. Brewer, 1 Pick. 314.) Ante, c. 2. § 20, 28. u.

[<sup>1</sup> Cormick v. Taylor, 2 Carter, (Ind.) 336.]

<sup>2</sup> If the land in possession of the heir is assigned to the widow for dower with his consent, by process of law, she thereby acquires a defeasible title to that parcel of land,

25. Where dower is assigned, there is a *warranty in law*, implied, that if the tenant be impleaded, she shall vouch the heir; and if evicted, shall recover in value a third of the remainder. (a)

26. Where the heir or terre-tenant refuses to assign dower to the widow, the law has provided her with several remedies for recovering it. The first of these is the writ of dower, *unde nihil habet*, which lies where no dower has been assigned. But if any part of dower has been assigned, the widow cannot say *unde nihil habet*, and therefore she must have recourse to the writ of dower; which is a more general remedy, extending either to a part or to the whole. (b)†

27. Where a woman was disabled from suing for her dower at law, she was always *relieved in equity*. And now it is settled that widows labor under so many difficulties at law, from the embarrassment of trust terms, and other matters, that they are fully entitled to every assistance which a court of equity can give them, not only in paving the way to establish their right at law, but also in giving them complete relief, when the right is ascertained. (c)

28. Where a mother was guardian to her child, and received the rents of the estate of which she was dowable, but dower was never assigned to her, the Court of Chancery held that the want of a formal assignment of dower was nothing in equity, for still the right in conscience was the same. And if the heir brought a bill against the mother for an account of the profits, it was just that a court of equity should, in the account, allow a third of the profits for the right of dower. (d)

173 \* 29. [In assigning dower, the Court of Chancery allows the widow an *account of mesne profits* from the death of

(a) 1 Inst. 38. b. Bustard's case, 4 Co. Rep. 122. a. (Scott v. Hancock, 13 Mass. 162.)

(b) Gilb. Uses, 374, 367.

(c) Tothill, 82. Treat. of Eq. B. 1. c. 1. s. 3. Curtis v. Curtis, 2 Bro. C. C. 620. Mundy v. Mundy, 4 ib. 294. 2 Rep. Husb. and Wife, Jac. ed. 450—1. & n.

(d) Hamilton v. Mohun, 1 P. Wms. 118.

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to be rendered absolute by the subsequent acceptance and confirmation of the assignment by the proper court; and therefore she may enter forthwith, and gather the crop previously sown by the heir. Parker v. Parker, 17 Pick. 236.

[† Writs of right of dower, *unde nihil habet*, *a quare impedit* and ejectment are excepted out of the 36th section of the Stat. 3 & 4 Will. 4, c. 27, by which real and mixed actions are abolished.]

the husband, and will not permit her title to them to be defeated by the death of the tenant *pendente lite*, and although the length of time which may have elapsed since the husband's death exceed six years prior to the bill filed.] (a) †

(a) *Curtis v. Curtis*, *ubi supra*. *Oliver v. Richardson*, 9 Ves. 122.

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† By the Stat. 3 & 4 Will. 4, c. 27, s. 41, it is enacted, that after the 31st day of December, 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered by action or suit, for a longer period than six years next before the commencement of such action or suit. (So, in *New York*, Rev. St. Vol. II. p. 28, 3d ed.) [The consent of all parties interested is necessary to authorize a decree of a specific sum in lieu of dower. *Blair v. Thompson*, 11 Gratt. (Va.) 441.]

## CHAP. IV.

## WHAT WILL OPERATE AS A BAR OR SATISFACTION OF DOWER.

SECT. 2. <i>Attainder of the Husband.</i>	SECT. 18. <i>An Outstanding Term.</i>
3. <i>Attainder of the Wife.</i>	19. <i>A Devise is no Bar to Dower.</i>
4. <i>Elopement with an Adulterer.</i>	24. <i>Unless so expressed, when the Widow has an Election.</i>
11. <i>Detinue of Charters.</i>	29. <i>Sometimes held a Satisfaction.</i>
13. <i>Fine or Recovery.</i>	32. <i>A Bequest of Personal Estate no Bar to Dower.</i>
14. <i>Deed.</i>	
15. <i>Bargain and Sale in London.</i>	
16. <i>Jointure.</i>	

SECTION 1. The right to dower attaches at the instant of the marriage; nor can it, by the common law,† be defeated by the alienation of the husband alone; but still the wife may be barred from claiming dower by several acts subsequent to the marriage.

2. Formerly, if a *man* was *attainted* of treason or felony, his wife was thereby barred of her dower at common law, and by custom; except where the lands were held in gavelkind. By the Statute 1 Edw. VI. c. 12, the rigor of the common law was abated in this respect, it being thereby enacted that in all cases where the husband was attainted of treason or felony, his wife should have dower. But a subsequent Statute, 5 & 6 Edw. VI. c. 11, revived this severity against the widows of traitors, who are now barred of dower. And the words of the act being general, exclude the wife, as well in cases of petit, as of high treason. (a)‡

(a) 1 Inst. 41. a. Rob. Gav. 230. 1 Inst. 392. b.

[† Altered by Stat. 3 & 4 Will. 4, c. 105, s. 14.]

175\* ‡ In cases of misprision of treason, or attainder of felony\* only, the Stat. 1 Edw. 6, is still in force; therefore the widows of such persons are entitled to dower; and where offences have been made felony by modern acts of parliament, the wife's dower is, in general, expressly saved. 4 Bl. Comm. 392; 5 Eliz. c. 11, s. 4; 18 ib. c. 1, s. 2; 8 & 9 Will. 3, c. 36, s. 7; 15 Geo. 2, c. 28, s. 4.

[The attainder, though followed by pardon, will defeat the dower of lands whereof the husband was seised prior to such pardon. But if the attainder be reversed for error, the widow's title will revive.] (a)

3. If a woman be *attainted* of treason or felony, she will thereby lose her dower; but if pardoned, she may then demand it, though her husband should have aliened his land in the meantime; for when this impediment is once removed, her capacity to be endowed is restored. (b)

4. It has been stated that a divorce on account of adultery is no bar to dower.<sup>1</sup> But by the Stat. Westm. 2, c. 34, it is enacted, that if a wife willingly *leaves her husband* and *continues with an adulterer*, she shall be barred of her action to demand dower, if she be convicted thereupon; except her husband willingly,<sup>2</sup> and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action.<sup>3</sup> [And in a recent case it was held that adultery was a bar to dower, although committed after the husband and wife had separated by mutual consent.] (c)

5. Lord Coke, in his comment on the above statute, observes on the words *si sponte reliquerit virum suum, et abierit, et moretur cum adultero*; that although the words of this branch be in the conjunctive, yet if the woman be taken away, not *sponte*, but against her will, and after consent, and remain with

(a) Mayne's case, 1 Leon. 3. pl. 7. Co. Lit. 392. Perk. s. 387. Menvill's case, 13 Rep. 19. Moor, 639.

(b) 1 Inst. 33. a. Menvill's case, 13 Rep. 23.

(c) Hethrington v. Graham, 6 Bing. 135. 2 Inst. 433.

<sup>1</sup> [Ante, Title VI. ch. 1, § 16, \* 155.]

<sup>2</sup> He is not obliged to receive her, after she has willingly lived with an adulterer, even though he had himself previously brought an adulteress into the house and turned his wife, then innocent, out of doors. Govier v. Hancock, 6 T. R. 603.

<sup>3</sup> In some of the United States this provision has been expressly reenacted. See LL. New Jersey, Elmer's Dig. p. 145; Ohio, Rev. St. 1841, ch. 42, § 6; Illinois, Rev. St. 1839, p. 254. But it is believed to be held as the common law of this country, in all the States originally settled by English colonists or their descendants. See 4 Dane's Abr. 672, 676; 4 Kent, Comm. 53; Cogswell v. Tibbetts, 3 N. Hamp. 41. In Connecticut, it is necessarily implied in the statute, which gives dower only to the wife who lived with her husband at the time of his death, or was "absent from him by his consent, or by his default, or by inevitable accident." Conn. Rev. St. 1838, p. 188. By the Scotch law, adultery is a forfeiture of dower, if the husband adopted any proceedings at law, evincive of his intent to that effect, or of his offence against her; and this whether she eloped or not. 1 Stair's Inst. 39 (n) 321.

the adulterer, without being reconciled, she shall lose her dower. For the cause of the bar of her dower is not the manner of her going away, but the remaining with the adulterer, without reconciliation. He also observes upon the words *moretur cum adultero*, that although she does not continually remain with the adulterer, yet if she be with him, and commits adultery, it is a tarrying within the statute. Also if she once remains with the adulterer, and after he keeps her against her will; or if the adulterer turns her away; yet she shall be said *morari cum adultero*, within the act. (a)<sup>1</sup>

6. He further observes, that if a woman who has eloped from her husband with an adulterer, is afterwards reconciled, and cohabits with her husband, by coercion of the church, yet she will be barred of her dower. And if a woman goes away with another man, with her husband's consent, and afterwards 176 \* that man \* commits adultery with her, and she remains with him, without being reconciled to her husband, she shall be barred of her dower. (b)†

7. There is a curious case in the Rolls of Parliament, 30 Edward I., where a man by deed granted his wife to another, with whom she eloped and lived in adultery. It was determined, 1. That it was a void grant. 2. That it did not amount to a license, or at least was a void license. 3. That after elopement there should not be any averment *quod non fuit adulterium*, though she married the adulterer after her first husband's death; therefore that she was barred of dower. A sentence of purgation of adultery in the ecclesiastical court was also produced, but it was not allowed to have any effect. (c)

8. Where the friends of the husband removed him from his wife, published that he was dead, and persuaded the wife to marry another man, though the wife lived in adultery; yet inas-much as *non reliquit virum sponte*, it was held that she did not forfeit her dower. (d)

(a) 2 Inst. 435, 436. Co. Lit. 32. a. & n. 9. Ib. 33. (b) 2 Inst. 435.

(c) Rot. Parl., vol. 1. 146. 2 Inst. 436. Coot v. Berty, 12 Mod. 232. S. P.

(d) Green v. Harvey, 1 Roll. Ab. 680.

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<sup>1</sup> *Sponte virum mulier fugiens, et adultera facta,  
Dote suâ careat, nisi sponsi sponte retracta.*—1 Inst. 32, b.

[† The husband will not be obliged to take his wife back again after she has eloped from him and committed adultery. 6 T. R. 603.]

9. With respect to the circumstances necessary to prove a voluntary *reconciliation* by the husband, Lord Coke says, cohabitation is not sufficient, without reconciliation made by the husband *sponte*; so that cohabitation only in the same house with the husband will not avail. But in the following case, cohabitation as man and wife appears to have been held a sufficient proof of reconciliation. (a)

10. Reconciliation being pleaded, evidence was given that the husband and wife had, after the elopement, slept together several nights, and in divers places, and demeaned themselves as man and wife. It was objected that they never lived together in one house, but were apart; and the wife continued in adultery with one or more, during the life of her husband, *sed non allocatur*; for there might have been divers elopements, and divers reconciliations; and the defendant ought to take issue on one at his peril. (b)

11. *Detinue of charters* is another cause of the loss of dower.<sup>1</sup> For if in a writ of dower the tenant pleads that the demandant detains the charters of the estate, and she denies the fact, which is found against her, she shall lose her dower. But, 1. The \*charters ought to relate to the land whereof dower is \*177 demanded. 2. He who pleads this plea ought to show the certainty of the charters; whereupon a certain issue may be joined, as that they are in a chest or box, locked or sealed, which imports sufficient certainty. 3. No stranger, though he be tenant to the land, and has the evidences conveyed to him, can plead this plea. (c)

12. In several cases the heir is in the degree of a stranger, and

(a) 2 Inst. 436.

(b) *Haworth v. Herbert*, Dyer, 106. 2 Inst. 436.

(c) *Bedingfield's case*, 9 Rep. 15. Dyer, 250. a.

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<sup>1</sup> This plea is dilatory, admitting the title of the plaintiff, but alleging that she detains the deeds and evidences of the estate, so that he is ignorant of the lands; and that the defendant was always ready to assign the dower, if she would deliver them. Hence, it cannot be pleaded, first, if the heir holds by purchase, and not by descent; for then there is no privity in estate, nor can he be said to be ignorant of what he ought to assign. Secondly, if the widow received the deeds by delivery from the defendant himself. Thirdly, if the heir comes in as *vouchee* of the tenant; or, as *vouchee* having no lands in the county; or, as tenant by receipt; for such *vouchee* or tenant cannot render dower. 9 Rep. 18 b; *Park on Dower*, 295. If the wife surrenders the charters, she may have judgment. *Hob.* 199.

therefore shall not plead detinue of charters. 1. If the heir has the land by purchase. 2. If he has delivered the charters to the widow; for then she has them by his own act. 3. If the heir be not immediately vouched. 4. If he comes in as vouchee. 5. If he comes in as tenant by receipt. The reason is manifest, if the true form of pleading in that case be observed; for he who pleads detinue of charters, in bar of dower, ought to plead that he has been always ready, and yet is, to render dower, if the demandant would deliver to him his charters. (a)

13. If a woman *joins with her husband* in levying a fine, or suffering a common recovery, of lands whereof she is dowable, she will thereby effectually bar herself from claiming dower out of those lands. The principles upon which this doctrine is founded will be explained hereafter. (b)

(14. In the United States, the usual method of barring dower, by the voluntary act of the wife, is, by her *joining with her husband in a deed* of conveyance of the land, containing apt words of release of dower on her part; acknowledged by her before a magistrate, in the mode prescribed by the statutes of the respective States; the manner of authenticating her act not being everywhere the same. This practice is probably coëval with the settlement of the country; and has been supposed to have originated in *Massachusetts*, from the colonial ordinance of 1644. If she was not of full age at the time of executing the deed, or if the deed does not contain apt words, showing her intention to relinquish her dower, she will not be barred therefrom, though she has signed and sealed the deed, and made the statute acknowledgment.<sup>1</sup>)

(a) *Burdon v. Burdon*, 1 Salk. 252.

(b) Tit. 35, 36.

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<sup>1</sup> 4 Kent, Comm. 59; *Catlin v. Ware*, 9 Mass. 218; *Powell v. Monson*, 3 Mason, 347, 351; *Hall v. Savage*, 4 Mason, 273; *Leavitt v. Lamprey*, 13 Pick. 382; *Priest v. Cummings*, 16 Wend. 617; *Markham v. Merrett*, 7 How. Miss. 437; *Thomas v. Gamel*, 6 Leigh, 9; *Post*, tit. 32, ch. 21, § 10, note.

Where the statute has directed the form of the acknowledgment, it must be strictly pursued, or the act of relinquishment will be void. *Kirk v. Dean*, 2 Binn. 341; *Thompson v. Morrow*, 5 S. & R. 289; *Sheppard v. Wardell*, Cox, R. 452; *Clarke v. Redman*, 1 Blackf. 379; *Scanlan v. Turner*, 1 Bail. 421.

In *New Hampshire*, if the wife is insane at the time of alienation by the husband, he may be licensed by the Judge of Probate to convey so as to bar her right of dower. Stat. 1851, ch. 1097. [By immemorial custom in *New Hampshire*, a wife may bar her dower in land by executing her husband's deed thereof, without apt words of release. *Dustin v. Steele*, 7 Foster, N. H. 431. And see *Burge v. Smith*, Ib. 332.]



15. By the *custom of London* a married woman may bar herself of dower, by a deed of bargain and sale, acknowledged before the lord-mayor, or the recorder and one alderman, and enrolled in the court of hustings; the wife being examined separately from her husband, as to her consent. (a)

16. The most usual mode of barring dower, in modern times, is by means of a *jointure* settled on the wife before marriage; of which an account will be given in the next title.

(17. But it may in this place be remarked, that, though the wife's dower may be barred by a jointure, yet her antenuptial covenant, in a marriage settlement, never to claim dower, will not have that effect; even though it contain an agreement that it may be pleaded in bar of any action of dower, unless the consideration on which the covenant was founded has been performed. Thus, where, by an antenuptial indenture, the husband settled an annuity on the wife for her life, and she covenanted never to claim dower in his estate; and he afterwards died insolvent; it was held that the covenant could not be set up by way of defence to her claim of dower; for being of a future interest, it

(a) Bohun, Priv. Lond.

After a sufficient lapse of time, a release of dower by the wife may be presumed. *Barnard v. Edwards*, 4 N. Hamp. 321; *Evans v. Evans*, 3 Yeates, 507.

[The wife cannot by any agreement between herself and husband, made during coverture, bar herself of dower. *Martin v. Martin*, 22 Ala. 86. A quit-claim deed from two grantors, signed and sealed by each of them, and signed by their wives, with but one seal against both signatures, and concluding after the release of dower, "In witness whereof we the grantors have hereunto set our hands and seals," is sufficient to bar the dower of the wives. *Tasker et al. v. Bartlett*, 5 Cush. 359. See also *Dundas v. Hitchcock*, 12 How. U. S. 251. The deed of a married woman, executed by her alone, relinquishing her dower in land previously conveyed by her husband by his separate deed, does not bar her dower therein. *Page v. Page*, 6 Cush. 196; *French v. Peters*, 33 Maine, (3 Red.) 396; *Witter v. Briscoe*, 8 Eng. 422. Nor is a widow barred of her claim of dower against a mortgagee who has foreclosed, she not joining in the mortgage, by a release of her dower, to the purchaser of the equity of redemption. *Littlefield v. Crocker*, 30 Maine, (17 Shep.) 192. Where a wife has barred herself of her right of dower by joining in a mortgage with her husband, she can be restored to her right of dower, if the mortgage is extinguished by her husband, or by some one in his right, or by a redemption by payment of the debt herself. *Brown v. Lapham*, 3 Cush. 551, 554. A husband made three mortgages of his premises. His wife joined, in release of her dower, only in the second mortgage. The third mortgagee paid the first and second mortgages; and the wife became thus entitled to dower in the whole land. *Wedge v. Moore*, 6 Cush. 8. See also *Young v. Tarbell*, 37 Maine, 509; *Smith v. Stanley*, Ib. 11; *Hastings v. Stevens*, 9 Foster, 564.]

was not technically a release; and the consideration or condition, apparent on the face of the instrument, not having been performed, it could not operate either as an estoppel or by way of rebutter.<sup>1)</sup>

[18. A legal *term of years* created *before* the title of dower attached, will, if assigned to a trustee for a purchaser, be a protection against the dower of the vendor's wife, whose claim will be barred by a *cesset executio* during the term. The Court has even compelled the widow herself, in whom the term happened to vest by the death of the trustee, to assign the term to the purchaser's trustee, to the exclusion of her own dower.

Thus, in *Mole v. Smith*, the freehold estate of Watson, a bankrupt, was sold by the assignees to Smith, who entered into possession under the contract, and afterwards filed his bill against the assignees, the bankrupt, and his wife, for specific performance, and an assignment of three terms, which, upon the bankrupt's purchase, had been assigned to Yellowly to attend. The terms happened to vest in the bankrupt's wife as surviving administratrix of Yellowly. Upon the bankrupt's death his widow claimed her dower, and insisted that she ought not to be compelled to assign the terms vested in her to a trustee for the purchaser as a protection against her dower. Sir Thomas Plumer, M. R., expressed considerable doubt whether the Court could compel her to assign the term. The cause came on again before Lord Eldon, C., on the 4th of April, 1822. The following were the reasons of his lordship's decision; that the husband, before his bankruptcy and in his lifetime, might have compelled the administrator of Yellowly to assign the terms to a trustee for the purchaser; that the purchaser would have been entitled to call for such assignment in order to protect himself from the claim of the wife's dower; that the assignees for the benefit of the creditors were entitled as fully as the bankrupt himself; and that the widow, as administrator of Yellowly, could not make any use of the terms for her own benefit, which she

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<sup>1</sup> *Hastings v. Dickinson*, 7 Mass. 153; *Gibson v. Gibson*, 15 Mass. 106, 110; *Vance v. Vance*, 8 Shepl. 364. [*Vincent v. Spooner*, 2 Cush. 467. An agreement to receive a fixed sum of money annually in lieu of dower, does not bar a widow from claiming dower, if the sum be not paid. *Sargent v. Roberts*, 34 Maine, (4 Red. 135.) See, also, *Furber v. Chamberlain*, 9 Foster, N. H. 405.]

could not have compelled Yellowly himself to make. His lordship accordingly declared, that as the trustee, Yellowly (whom the bankrupt's widow represented) would, if living, have been compelled by the assignees to assign the terms to a trustee for the purchaser, in order to carry the contract into effect, the widow was also compellable to assign them. (*a*)

But as between the widow and the heir and devisee of her husband, she will not be excluded by the term, which is as much attendant upon her dower, as upon the remaining interest in the inheritance, and she will be entitled to the benefit of it.] (*b*)

19. Every *devise* or *bequest* in a will imports a bounty; and therefore cannot in general be averred to be given as a satisfaction for that to which the devisee is by law entitled. In consequence of this principle, a devise cannot be averred even in equity, to be in satisfaction of dower, unless it is so *expressed*<sup>1</sup> in the will. 1. Because a devise implies a consideration in itself; and cannot be averred to be for the use of any other person than the devisee, unless it is so expressed in the will; no more can a devise be averred to be in satisfaction of dower, unless it is so expressed. 2. As all wills of land must be in writing, no \*averment respecting the intention of a testator is admis- \* 179 sible, which cannot be collected from the words of the will itself. (*c*)

20. A person being indebted, devised part of his lands to his wife, but did not mention it to be in bar of dower; and devised the residue to his executors, till his debts were paid. The wife brought a writ of dower, and recovered her dower. The heir filed a bill in chancery against her, to be relieved. The Court said the devise was not to be looked upon as a recompense or bar of dower, but as a voluntary gift. (*d*)

21. If a husband devises lands to his wife during her widowhood only, or restrains the devise in any other manner, so as to render it less beneficial than dower, a court of equity will not interfere; but the wife will be allowed to take both the thing devised, and also her dower.

(*a*) 1 Jac. & Walk. 665. 1 Jac. 490.

(*b*) Tit. 12. ch. 8. s. 44. Maundrell v. Maundrell, 7 Ves. 567. 10 Ves. 246.

(*c*) 1 Inst. 36. b. Vernon's case, 4 Rep. 4. a. Tit. 38. c. 1. See also 3 & 4 Will. 4. c. 105. s. 9 10. supra, p. 161, note. Tit. 38. c. 9.

(*d*) Hitchin v. Hitchin, Prec. in Cha. 133.

1 Or clearly implied. Birmingham v. Kirwan, 2 Sch. & Lefr. 444, 452; Hitchin v. Hitchin, Prec. Chan. 133. See farther on this subject, *post*, § 24, note.

22. W. Lawrence devised lands of the annual value of £130 to his wife, during her widowhood. After the determination of that estate, he devised the same premises, together with all his other lands, to trustees, for a term of twenty-four years, to commence from his decease, in trust for the payment of his debt and legacies. As a farther provision for his wife, he directed that after two years of the term were expired, his trustees should permit her to receive the rents and profits of another farm of £90 *per annum*, for the remainder of the said term of twenty-four years, so long as she should continue a widow. The widow entered upon the lands devised to her, and afterwards brought a writ of dower, to which was pleaded the devise, with an averment that the same was in satisfaction of her dower. Upon demurrer to this plea, judgment was given for the demandant. (a)

A bill was then exhibited in Chancery, to be relieved from this judgment; and a perpetual injunction was at first decreed against the widow; but, on a rehearing, this decree was reversed. (b)

On an appeal from this last decree to the House of Lords, it was contended for the appellant, that it would be against the rules of natural equity and justice, if the respondent should be permitted to enjoy the estates devised to her by her husband's will, and at the same time disappoint his intention, by insisting on her dower; for which the lands devised were far from an equivalent. On the other side, it was said to be nowhere expressed, nor to be collected from the words of the will, that the lands devised to the respondent were for her jointure, or in bar of her dower; neither could it be so averred at law, or in a court of equity; she having no estate for life, but for her widowhood only. The decree of reversal was affirmed. (c)

23. A person devised lands to his wife for life, and devised other lands to his brother and his heirs. The wife entered into the lands devised to her, which were of more value than her dower; she afterwards claimed dower of the rest, and had judgment. The brother brought his bill in Chancery to be relieved. The case of Lawrence and Lawrence was cited for the defendant, to prove that the wife should have dower, notwithstanding

(a) Lawrence v. Lawrence, 1 Ld. Raym. 438. 2 Freem. 234. 3 Bro. P. C. 483.

(b) 2 Vern. 365. 1 Ab. Eq. 218.

(c) 1 Bro. Parl. Ca. 591.

a devise to her for life of lands by her husband; unless declared to be in lieu and satisfaction of dower. Lord Parker said that this point had been determined in the House of Lords; and dismissed the bill. (a)

24. If it be said in the will that the devise is *made in lieu and satisfaction of dower*, or *on condition* that the wife shall not \*claim dower; then the wife cannot have both, for \*181 that would be repugnant to the intention of the testator.

The wife must, therefore, in such a case make her *election*. (b)†<sup>1</sup>

(a) *Lemon v. Lemon*, 8 Vin. Ab. 366. *Incedon v. Northcote*, 3 Atk. 430.

(b) *Leake v. Randall*, 4 Rep. 4. a.

[† But see Stat. 3 & 4 Will. 4, c. 105, s. 9, 10, 12.]

<sup>1</sup> [A husband by will made certain provisions for his wife, declaring them to be “in lieu of her dower or other interest in my estate.” And after making the will acquired other real estate. The widow having elected to accept the provisions of the will, was thereby barred of her dower in the after-acquired estates. *Chapin v. Hill*, 1 Rhode Island, 446.]

In several of the United States, it is expressly enacted that a provision made for the wife by the will of her husband shall, in certain cases, bar her dower.

As to the nature of the provision, by the laws of some States, any pecuniary provision is sufficient. See *Maine*, Rev. St. ch. 95, § 10—13; *Massachusetts*, Rev. St. ch. 60, § 8—11; *Indiana*, Rev. St. 1843, ch. 28, § 101; *New York*, Rev. St. Vol. II. p. 27, 3d ed.; *Arkansas*, Rev. St. 1837, ch. 52, § 9—23; LL. *Maryland*, Vol. I. p. 406, Dorsey’s ed.; *Tennessee*, Stat. 1784, ch. 22, § 8; LL. *North Carolina*, Vol. I. p. 612; *Alabama*, Toulm. Dig. p. 258; *Michigan*, Rev. St. 1838, p. 264; *Illinois*, Rev. St. 1839, p. 696; *Mississippi*, How. & Hut. Dig. p. 350; *Connecticut*, Rev. St. 1838, p. 189; *Vermont*, Rev. St. 1839, p. 51.

In *New Jersey*, Elm. Dig. p. 145, and in *Delaware*, Rev. St. 1829, p. 168, and in *Missouri*, Rev. St. 1845, ch. 54, § 11, it is provided that any devise of lands shall have this effect.

As to the intent of the testator, it is conceived that these statutes have not changed the rule of law, requiring evidence that the provision was intended in lieu of dower. In the laws of *Vermont*, *Connecticut*, *New York*, *Arkansas*, *Indiana*, *Maine*, *Massachusetts*, *Virginia*, and *Kentucky*, (1 LL. Ky. 575,) it is expressly required that the provision, to constitute a bar, must be made in “*lieu of dower*.” But the method of ascertaining the intent is different, in different States. In some States, the provision, whatever it be, is taken to be intended in lieu of dower, “unless it be otherwise expressed in the will.” Such is the law of *Mississippi*, How. & Hut. Dig. p. 350; and of *Maryland*, LL. *Maryl.* Vol. I. p. 406, Dorsey’s ed.; and of *Delaware*, Rev. St. 1829, p. 168; and of *Illinois*, Rev. St. 1839, p. 696; and of *Arkansas*, Rev. St. 1837, ch. 52, § 23. In these cases, the claim of the wife is *primâ facie* barred by the bare fact that the requisite provision is made; and the burden is on her to take the case out of the operation of the rule. In the statutes of other States, the language is not quite as strong, the rule being that the wife shall not take both the devise or bequest and also her dower, “unless it appears by the will that the testator plainly so intended.” See *Maine*, Rev. St. ch. 95, § 13; *Massachusetts*, Rev. St. ch. 60, § 11; *Michigan*, Rev. St. 1846, p. 269; *Indiana*,

25. A man devised the third part of his lands to his wife, in recompense of her dower. The wife entered on the lands de-

Rev. St. 1843, ch. 28, § 101. In *Virginia*, where the conveyance of lands only, by deed or will, is permitted to defeat the right of dower, the husband's intention may either be shown by the deed or will, or be averred and proved by parol. Tate's Dig. p. 176; *Ambler v. Norton*, 4 Hen. & Munf. 23; *Herbert v. Wren*, 7 Cranch, 377.

As to the election of the wife to take the provision thus made for her, or to claim her dower, it is understood to be conceded to her in all the States; restricted only in the time and manner of its exercise. In most of the States, a period is fixed by law, within which she must elect whether to accept the provision made in lieu of dower, or to insist upon her general right at law; and failing to renounce the provision, in the manner prescribed, she is conclusively deemed to have accepted it. In *Delaware*, she must make [her election on a day assigned in the particular case, by the Orphans' Court. Del. Rev. St. 1829, p. 168. In *Connecticut*, it must be done within two months after the time limited by the Probate Court for bringing in claims against the estate. In *Maine*, *Massachusetts*, *New Jersey*, *North Carolina*, *Tennessee*, *Illinois*, *Maryland*, and *Mississippi*, six months are allowed, computing from the time of the probate of the will. In *Vermont*, it is eight months; and in *Rhode Island*, *Alabama*, and *Missouri*, it is twelve months, from the same period. In *Indiana*, *Virginia*, *Arkansas*, *Michigan*, and *New York*, one year is allowed, computing from the death of the husband. In the last three States, her election must be evinced either by entry on the lands to be assigned for her dower, or by commencing process for the recovery thereof. In *Indiana*, the lapse of the year is not conclusive, unless she also had knowledge of the provision made for her. Ind. Rev. St. 1843, ch. 28, § 102. [But if a widow accept a provision made for her by will, in lieu of dower, without full knowledge of the extent of such provision, and of her own legal rights, she may renounce the provision so made and claim dower, even after the lapse of years. *United States v. Duncan*, 4 McLean, 99; see also *Sisk v. Smith*, 1 Gilm. 514; and *Tooke v. Hardeman*, 7 Geo. 20. And this, notwithstanding the statute of *Illinois* declaring that any provision in a will bars dower, unless expressed otherwise in the will, and unless the widow in six months renounces the provision.]

For the particular exposition of these statutes the student is referred to the following cases:—In *Pennsylvania*, *Evans v. Webb*, 1 Yeates, 24; *Sample v. Sample*, 2 Yeates, 433; *McCulloch v. Allen*, 3 Yeates, 10; *Creacraft v. Wions*, Addis. 350; *Duncan v. Duncan*, 2 Yeates, 302; *Hamilton v. Buckwalter*, Ib. 389; *Allen v. Allen*, 2 Pennsylv. 310; *Cauffman v. Cauffman*, 17 S. & R. 16; *Webb v. Evans*, 1 Binn. 565; [*Ulp v. Campbell*, 19 Penn. (7 Harris,) 361; *Light v. Light*, 21 Ib. (9 Harris,) 407; *Borland v. Nichols*, 12 Ib. (2 Jones,) 38.] In *New York*, *Jackson v. Churchill*, 7 Cowen, 287; *Larrabee v. Van Alstyne*, 1 Johns. 30; *Kennedy v. Mills*, 13 Wend. 553; *Van Orden v. Van Orden*, 10 Johns. 30. [In *Maryland*, *Collins v. Carman*, 5 Md. Ch. Decis. 503.] In *Massachusetts* and *Maine*, *Merrill v. Emery*, 10 Pick. 507; *Reed v. Dickerman*, 12 Pick. 146; *Perkins v. Little*, 1 Greenl. 148; *Thompson v. McGaw*, 1 Met. 66. [*Hastings v. Clifford*, 32 Maine, 132; *Gowen, Appellant*, 32 Maine, 516; *Adams v. Adams*, 5 Met. 277; *Pratt v. Felton*, 4 Cush. 174.] See also, *Leinaweaver v. Stoevoer*, 1 Watts & Serg. 160; *White v. White*, 1 Harr. 202; *Thompson v. Egbert*, 2 Harr. 459; *Davison v. Davison*, 3 Green, 235; *Pickett v. Peay*, 3 Brev. 545; *Green v. Green*, 7 Port. 19; *McLeod v. McDonnell*, 6 Ala. R. 236; *ex parte Moore*, 7 How. Miss. R. 665; *Boone v. Boone*, 3 Har. & McH. 95; *Ambler v. Norton*, 4 Hen. & Munf. 23; *Pettijohn v. Beasley*, 1 Dev. & Batt. 254; [*Jones v. Jones*, Bus. (N. C.) 177; *Sisk v. Smith*, 1 Gilm. 514.]

vised to her; it was resolved that she was thereby barred of dower. (a)

26. A person devised his lands to his wife till P., his daughter, attained the age of nineteen, afterwards to P. in tail, remainder over in fee. He devised further, that P. should pay, after her age of nineteen, £12 *per annum* to his wife in recompense of her dower; if she failed of payment, that his wife should have the land for her life. The wife, before P. attained nineteen, brought a writ of dower, and recovered a third part; after P. attained nineteen, the wife entered for non-payment of the £12. The question was whether her entry was lawful. It was adjudged, that the wife, having recovered a third part in dower, she should not have the rent; as it was against the intention of the testator that she should have both; that the acceptance of the one was a waiver of the other. And upon a writ of error this judgment was affirmed. (b)

27. A man devised his personal estate to trustees, in trust that his widow should receive thereout £100 a year during her life, in lieu and discharge of her dower. The wife received this annuity for many years, then brought a writ of dower. Decreed that the wife was barred of dower, as long as the personal estate was sufficient. (c)

28. With respect to the acts which will amount to an election, and the time within which they must take place, they will be stated hereafter. (d)

29. Notwithstanding the doctrine established in the case of *Lawrence v. Lawrence*, and the frequent recognition of it, devises have been sometimes deemed a *satisfaction in equity for dower*, on account of strong and special circumstances. As where allowing a widow to take a double provision, would be quite inconsistent with the dispositions of the will.

30. A person devised to his wife an annuity of £200 a year, to be issuing out of his lands, with the power of distress and \*entry; subject thereto, he devised his real estates to \*182 his daughter in strict settlement; and directed all his personal estate to be invested in land, and settled to the same uses. (e)

(a) *Bush's case*, Dyer, 220.

(b) *Gosling v. Warburton*, Cro. Eliz. 128.

(c) *Lesquire v. Lesquire*, Finch. 134.

(d) Tit. 38. c. 2.

(e) *Villa Real v. Galway*, 1 Bro. C. C. 292. note, Amb. 682.

One of the questions in this case was, whether the wife was to take this annuity in satisfaction of her dower or not. (And Lord Camden was of opinion that the claim of dower would disappoint the will, and was inconsistent with it; for it went to put the trustees out of possession of the portion of land claimed as dower, and also to diminish the annuity itself contrary to the intent of the testator, by taking away a part of the source from which it was derived. He, therefore, decreed that the widow must make her election.) (a)

31. There are, however, several modern cases, where a devise of an annuity to a wife, either entirely or partly charged on the estates of which she is dowable, together with the gift of those estates to another, or a devise of them to trustees, has been held not to be a satisfaction of dower, but the widow has been allowed to have both. (b)

32. A bequest of the residue of personal estate will not be considered as a bar to dower.

33. A man, by his will, taking notice of his wife's title to dower, made a provision for her out of his personal estate by way of residue. This was insisted on to be an implication to bar dower. Lord Hardwicke rejected the idea; because by the claim of dower, the wife did not break in on the will; and this was the stronger as it was only a residue; which accidental benefit he might intend she should have, as well as dower.† (c)

(a) *Jones v. Collier*, Amb. 730. *Wake v. Wake*, 3 Bro. C. C. 255. 1 Ves. jun. 335. *Pearson v. Pearson*, 1 Bro. C. C. 292. *Boynton v. Boynton*, *id.* 445. *Miall v. Brain*, 4 Mad. 119.

(b) *Foster v. Cook*, 3 Bro. C. C. 347. *French v. Davies*, 2 Ves. jun. 572. *Strahan v. Sutton*, 3 Ves. 249. *Greatorex v. Carey*, 6 Ves. 615.

(c) *Ayres v. Willis*, 1 Ves. 230. See Stat. 3 & 4 Will. 4. c. 105. s. 9, 10, 12.

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[† It is now well settled that in order to deprive a widow of dower, by putting her to election between it and the provisions made by her husband's will, it must be shown that the testator meant to exclude her from it, as where there is an inconsistency between her claim to dower and the testamentary disposition.

A pecuniary legacy, personal annuity, or other benefit merely affecting the personal assets of the testator, without any declaration that it shall be in bar of dower, does not raise an implication of intention on the part of the testator to exclude the widow's legal right, because there is no inconsistency between it and the bequest. *Strahan v. Sutton*, 3 Ves. 249; *Ayres v. Willis*, 1 Ves. sen. 230. See Stat. 3 & 4 Will. 4, c. 105, s. 10.

But where the testator devises lands, or rents out of lands, in which the wife is dowable, a presumption arises from that circumstance, though not of itself sufficient, that the testator intended the testamentary gift should be in lieu of dower. Notwithstanding this, however, the intention may yet be doubtful, and if so the widow will not be put to



her election. The following is a chronological list of the principal cases of devises of \* real estate, subject to dower, wherein the intention to exclude the wife \* 186 was held not sufficiently apparent. *Lawrence v. Lawrence*, 2 Vern. 365; *Lemon v. Lemon*, 8 Vin. Ab. Devise P. 366, pl. 45; *Hitchen v. Hitchen*, Pre. Chan. 133; *French v. Davies*, 2 Ves. jun. 572; *Brown v. Parry*, 2 Dick. 685; *Strahan v. Sutton*, 3 Ves. 249; *Birmingham v. Kirwan*, 2 Scho. & Lef. 444. See Stat. 3 & 4 W. 4, c. 105, s. 9.

The devise of the annual rents or charges out of estates wherein the widow is dowerable has been considered such an equivocal manifestation of the testator's intention, as not to exclude the widow's right to dower. The cases upon this subject are conflicting. They occurred in the following order:—*Pitts v. Snowden*, 1 Bro. C. C. 292, note; *Arnold v. Kempstead*, 2 Eden, 236; *Amb. 466*, S. C.; *Villa Real v. Galway*, *Amb. 682*; *Jones v. Collier*, *Amb. 730*; *Pearson v. Pearson*, 1 Bro. C. C. 292; *Wake v. Wake*, 1 Ves. jun. 335; *Foster v. Cook*, 3 Bro. C. C. 347; *Greator v. Cary*, 6 Ves. 615. See Stat. 3 & 4 W. 4, c. 105, s. 9.

Of these, *Pitts v. Snowden*, *Pearson v. Pearson*, *Foster v. Cook*, and *Greator v. Cary*, support the above proposition in favor of the widow's claim to both the dower and testamentary benefit. *Arnold v. Kempstead* is not to be reconciled with *Pitts v. Snowden*. *Villa Real v. Galway*, and *Jones v. Collier*, negated the widow's claim upon the peculiar wording of the wills, and *Wake v. Wake* was decided by Buller, J., on the authority of *Jones v. Collier*, which is no authority for the general proposition that the annuity is of itself a sufficient bar to the wife's right.

The following cases of devises of real estate are instances wherein the intention to exclude the widow has been held sufficiently apparent:—*Gosling v. Warburton*, Cro. Eliz. 128; *Boynton v. Boynton*, 1 Bro. C. C. 445; *Birmingham v. Kirwan*, 2 Scho. & Lef. 444; *Chalmers v. Storil*, 2 Ves. & Bea. 222; *Roberts v. Smith*, 1 Sim. & Stu. 513; *Dickson v. Robinson*, MS. Rolls, 30th April, 1822, stated 1 Roper, Husband and Wife, by Mr. Jacob, 580; *Miall v. Brain*, 4 Mad. 119; *Butcher v. Kemp*, 5 Mad. 61; *Reynolds v. Torin*, 1 Russ. 129; *Roadley v. Dixon*, 3 Russ. 192; and see *Coleman v. Jones*, 3 Russ. 312.

Testamentary provision expressly given in lieu of dower and thirds out of the real and personal estate of the husband, will not preclude the widow from claiming her distributive share of her husband's effects as next of kin. *Sympson v. Hornsby*, 11 Vin. 185; 2 Eq. Ca. Ab. 439; 2 Vern. 722, cited 3 Ves. 335; *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581; 3 Ib. 332, 493.

The subject of the above note is discussed, and the cases stated in detail, by the Editor, in his edition of *Roper's Legacies*, Vol. II. p. 530—546.]

## TITLE VII.

## JOINTURE.

## BOOKS OF REFERENCE UNDER THIS TITLE.

COKE upon Littleton, fol. 36, b.

VERNON'S Case, 4 Co. 1.

FLINTOFF on Real Property. Vol. II. Book I. ch. 3.

CHAMBERS on Estates, p. 106—110.

ROPER on Husband and Wife. Vol. I. ch. 10, p. 460—524.

KENT'S COMMENTARIES. Vol. IV. Lect. 55.

BLACKSTONE'S COMMENTARIES. Book II. ch. 8.

## CHAP. I.

## OF THE ORIGIN AND NATURE OF JOINTURES.

## CHAP. II.

## WHERE A JOINTRESS IS AIDED IN EQUITY.

## CHAP. III.

## WHAT WILL OPERATE AS A BAR OR SATISFACTION OF A JOINTURE.

## CHAP. I.

## OF THE ORIGIN AND NATURE OF JOINTURES.

- SECT. 1. *Origin of Jointures.*  
 5. *Definition of.*  
 6. *Circumstances required.*  
 7. *Must commence on the Death of the Husband.*  
 9. *And be for the Life of the Wife.*  
 12. *Must be limited to the Wife herself.*  
 13. *This Rule not admitted in Equity.*  
 17. *It must be in Satisfaction of her whole Dower.*  
 18. *And be so expressed or averred.*  
 21. *And made before Marriage.*  
 22. *Jointures which require the Acceptance of the Wife.*  
 25. *Cases where the Widow takes the Estate and Dower.*

- SECT. 26. [*Equitable Jointures.*]  
 30. *Who may limit a Jointure.*  
 34. *Who may take a Jointure.*  
 35. *An Infant is barred by a Jointure.*  
 39. [*An Infant not bound by uncertain or precarious Jointure.*]  
 40. *Nature of this Estate.*  
 41. [*Jointress may not commit Waste.*]  
 44. *Contribution of Jointress.*  
 45. *Jointress not entitled to Emblements.*  
 46. *Not liable to Crown Debts.*]  
 47. *A Rent-charge is usually given as a Jointure.*  
 48. *Effect of the Eviction of a Jointure.*

SECTION 1. In consequence of two maxims of the common law, First, that no right can be barred till it accrues; and, secondly,

that no right or title to an estate of freehold can be barred by a collateral \* satisfaction; it was found impossible to \*188 bar a woman of dower by any assurance of lands, either before or during the marriage. For a wife having acquired a right to be endowed of a third part of all her husband's lands at the moment of her marriage, this right, like all others, could only be extinguished by a release; and no such release of the wife, either before or during the marriage, would be valid. For, if before the marriage, it was no bar, because at the time of making it, the woman had no title to dower; and, therefore, a release from her then would be no bar to a right which accrued to her after. If it was made during the marriage, it was absolutely void, the wife not being then *sui juris*; and no estate limited to the wife, during the marriage, could bar her of dower, because no right or title to a freehold estate can be barred by a collateral satisfaction. (a)

2. It followed that every woman became entitled, upon her marriage, to one third of all her husband's real estates, however small her fortune might be. Such an inequality induced many persons to convey their lands to uses, a widow not being dowable of a use; and when this practice became general, it was usual on all marriages for the parents of the lady to procure the intended husband to take an estate from his feoffees to uses, and to limit it to himself and his intended wife for their lives, in joint tenancy or jointure, lest the wife should be totally unprovided for at the death of her husband. (b)

3. When the Statute of Uses transferred the legal estate to those who were entitled to the use of the lands, all women then married would have become dowable of such lands as had been held to the use of their husbands; and would also be entitled to any particular lands that were settled on them in jointure. But as this would have been a manifest wrong, the following clause was inserted in the Statute of Uses: (c)

4. "Whereas divers persons have purchased or have estate made and conveyed of and in divers lands, tenements, and hereditaments, unto them and to their wives, and to the heirs of the husband; or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies

(a) Vernon's case, 4 Rep. 1. Gilb. Uses, 147. Tit. 32. c. 6.

(b) 3 Rep. 58. b. 4 Rep. 1. b.

(c) Tit. 11. c. 3.

begotten; or to the husband and to the wife, for term of their lives, or for term of life of the said wife; or where any such estate or purchase of any lands, &c., hath been or hereafter shall be made to any husband and to his wife, in manner and form above expressed; or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed for the jointure of the wife; that then, and in every such case, every woman married having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue of the lands, &c., that at any time were her said husband's, by whom she hath any such jointure; nor shall demand nor claim her dower, of and against them that have the lands and inheritances of her said husband. But if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower, by writ of dower, after the due course and order of the common laws of the realm."<sup>1</sup> (a)

5. This statute has given rise to the *modern jointure*, which Lord Coke defines to be "a competent livelihood of freehold for the wife, of lands or tenements, &c., to take effect presently, in possession or profit, after the decease of her husband, for the life of the wife at the least, if she herself be not the cause of its determination or forfeiture." (b)

6. As this statute contradicts the common law, it has always been *construed strictly*; and Lord Coke has laid it down, that no estate limited to a woman shall be deemed a good jointure, and a bar to dower, under this act, unless it is attended with the following circumstances.

7. And *first* it *must commence* and take effect, in possession or profit, *immediately on the death of the husband*; for otherwise it will not be so beneficial as dower.

If therefore, an estate is conveyed to the husband for life, remainder to J. S. for life, remainder to the wife for life, in satisfaction of dower, this is not a jointure within the statute; because by the first limitation it is not to take effect in possession or

(a) St. 27 Hen. 8. c. 10. s. 6.

(b) 1 Inst. 37. a. (Vance v. Vance, 8 Shepl. 364.)

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<sup>1</sup> The provisions of this statute seem to have been substantially adopted in most of the United States in which the common law of dower prevails. See *post*, § 38, note (1.) 4 Kent, Comm. 56, note a.

profit, presently after the death of her husband. And although in this case J. S. should die in the lifetime of the husband, still it would be no bar to dower. (a)

8. So where a person covenanted to stand seised to the use of himself in tail, remainder to the use of his wife for life. This was held not to be a jointure, because it was to begin after the determination of an estate tail. And though the estate determined by the death of the husband, without issue, so that the wife's estate began immediately upon the death of her husband, \*yet as it was not a good jointure at the be- \*190 ginning, whatever happened afterwards could not make it good. (b)

9. The *second* circumstance is that it be *for the wife's life*, or for some greater estate. So that if an estate be limited to a woman, for the life or lives of one or more persons, or for a hundred, or a thousand years, if she lives so long, it is not a jointure. But although the statute recites five modes of limiting an estate in jointure, yet these are only mentioned as examples; and do not exclude any other estate consistent with the intention of the act. (c)

10. Thus in the Duchess of Somerset's case, 1 Mary, it was resolved by all the judges, that an estate limited to a man and his wife, and to the heirs male of their two bodies begotten, was a good jointure within the statute, though not one of the estates mentioned in it. And in Vernon's case it was held, that an estate limited to the husband for life, remainder to the wife for life, was a good jointure; though not one of the estates mentioned in the statute; because it was equally beneficial. (d)

11. It is said in Brooke's Abridgment that an estate, limited to a husband and wife and their heirs, is not a jointure within the statute, because it is not one of the estates mentioned in it. But Dyer contradicts this position, and proves that it would be a good jointure, the words of the act being, "for term of life or otherwise in jointure," which word "otherwise" extended to all other estates conveyed to the wife, which were as beneficial, or more, as the estates mentioned. (e)

12. The *third* circumstance is, that the estate must be limited

(a) 1 Inst. 36. b. 4 Rep. 2. a.

(b) Wood v. Shirley, Cro. Jac. 488. Caruthers v. Caruthers, 4 Bro. C. C. 500: 5 Ves. 192.

(c) 1 Inst. 36. b.

(d) Dyer, 97. b. 4 Rep. 2. a.

(e) Bro. Abr. Tit. Dower, 69. Dyer, 248. a. 4 Rep. 3. b.

to the wife herself, and not to any other person in trust for her. So that it was formerly held that if an estate was made to others in fee simple, or for the life of the wife, in trust, so as the estate remained in them, though for her benefit, and by her assent, yet at law it was no bar to dower.<sup>1</sup> (a)

13. Mr. Hargrave has observed on this passage, that though this may be true at law, yet it is now settled that a *trust estate* being equally certain and beneficial, as what is required at law, or even an *agreement* to settle lands as a jointure, is a *good equitable jointure*, and will be a bar to dower.

14. Thus, it was determined by the House of Lords, that a covenant from the intended husband that his heirs, executors, or administrators, would pay an annuity to his intended wife, for her life, in case she survived him, in full for her jointure, and in bar of her dower, without expressing that it should be charged upon lands, was a good equitable jointure, within the statute. Lord Hardwicke answered the objection of its being in the husband's power to have defeated this agreement, and sold or given away his whole estate, by Lord Letchmere's and other cases, where the agreement rested, as here, upon the husband's covenant. And further, by observing that such an alienation would have been an eviction of the fund out of which the jointure was to arise, and consequently let the wife into dower. To another objection, that the husband had not bound *himself* to do any act, but only that his heirs, executors, and administrators, should pay, &c., he answered, that the wife might, the day after the marriage, have brought a bill, by her next friend, and compelled the husband himself to settle the annuity. (b)

15. By indenture made previous to a marriage, the intended husband and wife assigned leasehold estates for years belonging to each of them to trustees, in trust to permit the husband to receive the rents for life, and after his decease to permit the wife to receive the rents for her life, in full for her jointure, and in bar

(a) 1 Inst. 36. b.

(b) *Bucks v. Drury*, 3 Bro. P. C. 492, *infra*, p. 195. *Jordan v. Savage*, 2 Eq. Ca. Ab. 101, *infra*. 9 Mod. 219. 4 Bro. C. C. 506. 11. Ca. temp. Talbot, 80.

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<sup>1</sup> A jointure by conveyance to another to the wife's use, is made good by statute in *Missouri*. Rev. St. 1845, ch. 54, § 12.

of dower. The Court of Chancery held this to be a good equitable jointure. (a)

16. In the case of *Tinney v. Tinney*, a sum of money secured by bond to the intended wife, before the marriage, was held to be a bar to dower. And in a case published by Mr. Cox, where the intended husband gave a bond to the mother of the intended wife, conditioned that he or his heirs would settle £500 a year in land on her, in satisfaction of dower; Sir T. Clarke, M. R., held it a good jointure. From which it appears that the Courts of Equity now consider any provision which a woman accepts before marriage, in satisfaction of dower, to be a good jointure. (b)

17. The *fourth* circumstance is, that it be made *in satisfaction of the wife's whole dower*, and not of a part of it only; for land conveyed to a woman in part of her jointure, or in satisfaction of part of her dower, is no bar, on account of the uncertainty. (c)

18. The *fifth* circumstance is, that the estate limited to the wife be *expressed, or averred* to be, *in satisfaction* of her whole dower. [And it ought to be so expressed in the instrument settling it; or it must appear by *necessary implication* from the \*contents of the instrument.†<sup>1</sup> But since the \*192 Statute of Frauds, it appears somewhat doubtful whether an averment can be admitted that the provision made for a wife, previous to marriage, was intended as a jointure, and in bar of dower. (d)

19. On a bill brought for dower, the defendant, the heir at law, insisted that the husband in his lifetime gave a bond in the penalty of £1000, in trust to secure to his wife £500, in case she survived; that it was intended at the time in lieu of dower; that she acknowledged it to be so, and offered to read evidence of her acknowledgment. Lord Hardwicke was of opinion that parol evidence could not be allowed in this case, being within

(a) *Williams v. Chitty*, 3 Ves. jun. 545.

(b) 3 Atk. 8. *Estecourt v. Estecourt*, 1 Cox, R. 20. *Corbet v. Corbet*, Sim. & Stu. 612. 5 Russ. 254.

(c) 1 Inst. 36. b.

(d) 9 Mod. 152,

[† See *Caruthers v. Caruthers*, 4 Bro. C. C. 500. See also *Garthshore v. Chalie*, 10 Ves. 1, 20.]

<sup>1</sup> Or, be fairly collected from the circumstances. *Walker v. Walker*, 1 Ves. sen. 53, and *Belt's Suppt.* 43, and cases there cited. And see 2 Eden, 60.

the Statute of Frauds; and that a general provision for a wife was not a bar of dower, unless expressed to be so. That in the case of *Vizard v. Longdale*, 5 Geo. I., Sir Joseph Jekyll held the words in a bond, to secure a sum of money for a woman's livelihood and maintenance, was no bar of dower; but that Lord Chancellor King was of opinion it was a bar of dower, being within the equity of the Statute of Henry VIII. of jointures, and, therefore, reversed the decree. (a)

20. It is, however, observable, that there is nothing in the Statute of Frauds excluding averments; and it is generally understood, that whatever averments might have been made before that statute, may be made since. Now in *Vernon's case*, and an anonymous case, Owen 33, it was averred that the estate limited to the wife, was for her jointure, and in bar of dower; and the averment was allowed. (b)

21. The *sixth* circumstance is, that it be made *before marriage*. For it is enacted by the ninth section of the statute, that if any wife have any manors, &c., assured to her after marriage, for term of life or otherwise, in jointure, except the same be made by act of parliament, the wife shall at her liberty, after the death of her husband, refuse the jointure, and demand her dower. (c)

22. A jointure, attended with *all the circumstances* above stated, is binding on the widow, and a complete *bar to her claim of dower*; or rather prevents her title to dower from ever arising.<sup>1</sup> But there are *other estates* limited to a wife, which are *good jointures* within the statute, *provided she accepts of* 193 \* *them* \* after the death of her husband; though she is at liberty to reject them, and to claim her dower. Thus an estate settled on the wife after marriage may, by the express words of the statute, be rejected by the widow after her husband's death; in which case she may claim her dower. But if she once accepts of such jointure, she is thereby bound. (d)

(a) *Tinney v. Tinney*, 3 Atk. 8. Tit. 32. c. 20. *Walker v. Walker*, 1 Ves. 54. *Couch v. Stratton*, 4 Ves. jun. 391.

(b) *Infra*, s. 25.

(c) 1 Inst. 36. a. 4 Rep. 3. a. (*Vance v. Vance*, 8 Shepl. 364.)

(d) (*Hastings v. Dickinson*, 7 Mass. 153.)

<sup>1</sup> It is not essential to this end, that the land should be free of incumbrance; for if the incumbrance is paid off, the jointure remains good; and if the wife is evicted she may claim her dower. *Ambler v. Norton*, 4 Har. & McH. 23. See *post*, § 48.



23. An estate for life, limited to a woman for her jointure, upon condition to perform her husband's will, or which is determinable by a second marriage, is a jointure within the statute; provided the wife accepts of it, after the death of her husband.<sup>1</sup>

24. In a writ of dower, the tenant pleaded that the husband of the demandant was also seised of lands in the same county, which he had conveyed to the use of himself for life, remainder to his wife for life; and averred that the estate for life so limited to the demandant was for her jointure, and in full satisfaction of her dower; and that after the death of her husband she had entered into the lands so limited to her for her jointure, and agreed to it. The demandant replied, and confessed the conveyance by which she took an estate for life; but said that the estate was upon condition that she should perform her husband's will; and demanded judgment if the tenant should be admitted to aver that this estate so limited to the wife, upon the said condition, was for the jointure of the wife, and in satisfaction of her dower; upon which the tenant demurred in law. It was resolved, that although the estate limited to the wife was upon condition; and although dower, in lieu of which the jointure was given, was an absolute estate for life; yet, inasmuch as an estate for life upon condition was an estate for life, it was within the words and intent of the act, if the wife, after the death of the husband, accepted it; therefore she was barred of her dower. It was also said, that an estate limited to a woman during her widowhood for her jointure, was good within the statute, if she accepted it. (a)

25. It appears from the preceding cases, that there are *two sorts of jointures* within the statute. One which prevents the title to dower from ever arising; another which, when accepted, but not before, becomes a bar to dower. Thus in Vernon's case it was said, that if the estate there limited to the wife was not within the statute, then it was no bar to dower; but the demandant should have both. And Lord Coke says, that where the estate limited to the wife does not take effect immediately

(a) Vernon's case, 4 Rep. 1. Dyer, 317. a.

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<sup>1</sup> So, a base freehold, as, *durante viduitate*, if accepted by a wife of full age, is a bar of dower. *Aliter*, if she be an infant. *McCarty v. Teller*, 2 Paige, 511. See farther, on this point, *post*, § 38, note.

194 \* \* on the death of the husband, in which case it is not within the statute, the widow shall take such estate, and dower also. (a)

26. [As legal jointures, made before marriage, if the woman be of age, will be binding after the husband's death, so also will equitable jointures so made. And as at law a jointure made after marriage, will not be obligatory upon the widow, after her husband's death, but will depend for its validity upon her acceptance, so neither, under similar circumstances, will equitable jointures be binding upon her, but require her confirmation.]

27. A legal jointure, as before noticed, must commence in possession and profit immediately after the husband's decease; but an equitable jointure, made before marriage, the wife being a party to the deed and adult, will be equally binding upon her, though she thereby accept a more uncertain or disadvantageous provision; for by that agreement she will be absolutely barred of her common-law right.† And notwithstanding the provision be not secured upon freehold estate;‡ and although the jointure rest only on covenant.§

28. But if the provision be made after marriage, an equitable, as well as a legal jointure, may be accepted or rejected by the widow, after her husband's death. But there is this distinction; if the provision be not a legal jointure within the act, the widow is not at law put to her election, but will be entitled to both provisions; in equity, however the rule is otherwise, for in every such case the widow is obliged to make her election between the equitable jointure and her legal right. (b)

195 \* \* 29. It is not necessary that the provision in bar of dower should be expressly stated to be in bar of dower; it will be sufficient if it can be collected from the instrument that such was the intention.]]

30. It is *not necessary* that the estate limited as a jointure should proceed *immediately* from the husband; for if it comes

(a) 4 Rep. 2. b. 1 Inst. 36. b.

(b) Caruthers v. Caruthers, 4 Bro. C. C. 513.

[† Caruthers v. Caruthers, 4 Bro. C. C. 513.]

[‡ Rose v. Reynolds, 1 Swan. 446; Vizard v. Longden, cited 2 Eden, 66; Lacy v. Anderson, 1 Swan. 445; Gladstone v. Ripley, cited 2 Eden, 59, 60.]

[§ Sidney v. Sidney, 3 P. Wms. 269.]

[|| Vizard v. Longdale, cited 3 Atk. 8; 1 Ves. sen. 55; 2 Eden, 60; Walker v. Walker, Belt. Supp. to Ves. sen. p. 43, and cases there cited.]

through the medium of trustees, or of the demandant in a common recovery, it will be good.

31. A bargained and sold lands to I S and I N to make them tenants in the *præcipe*, for the purpose of suffering a common recovery, which was duly had, to the use of A and his wife, for her jointure. Resolved, that this was an assurance by A himself, for the advancement of his wife. (a)

32. If the estate proceeds from the father of the husband it will be good.

33. The father of the husband, in pursuance of articles, enfeoffed trustees before the marriage to the use of the intended wife for life; the question was, whether this was a good jointure, it not being made by the husband, nor of his lands. Held a good jointure. (b)

34. As a jointure is an estate limited to a woman in lieu and satisfaction of dower, it follows that *all those who are capable of being endowed* may take a jointure.

35. It was formerly much doubted whether a jointure, settled on an *infant*, before marriage, was a bar to dower. But it has been solemnly determined in the following case, by the House of Lords, with the concurrence of a majority of the judges, that such a jointure is good, and that the infant cannot waive it after her husband's death, and claim dower.<sup>1</sup>

36. Sir Thomas Drury, previous to his marriage with Martha Tyrrell, who was then an infant, by indenture made between the said Sir Thomas Drury of the first part, the said Martha Tyrrell of the second part, and two trustees of the third part, agreed that the said Martha Tyrrell, in case the marriage took place, and she survived her intended husband, should have and enjoy an annuity

(a) Bridge's case, Moor, 718.

(b) Ashton's case, Dyer, 228. Melle's case, cited 4 Co. 4.

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<sup>1</sup> By the statute of *Ohio*, Rev. St. 1841, ch. 42, § 2, and of *Missouri*, Rev. St. 1845, ch. 54, § 13, if the jointure, or other estate conveyed in lieu of dower, was made while the woman was an infant, or after marriage, she may waive it after the husband's death, and claim her dower. So is also the law of *Rhode Island*, Rev. St. 1844, p. 191; and of *Kentucky*, Rev. St. Vol. I. p. 575, 576; and of *Virginia*, Tate's Dig. p. 176, 177. In *Maine*, no jointure will prevent the claim of dower, unless it was made before the marriage, and with the consent of the wife, expressed in the deed. *Maine* Rev. St. ch. 95, § 10; *Vance v. Vance*, 8 Shepl. 364. Such also is the law in *Massachusetts*, *New York*, *Indiana*, and *Arkansas*. See *post*, § 38, note (1.)

of £600 during her life, for and in the name of her jointure; and that the same should be accepted and taken by her in full satisfaction and bar of her dower; and Sir Thomas Drury 196 \* covenanted \* with the trustees to pay the said annuity of £600. This deed was executed by Sir Thomas Drury and Miss Tyrrell, in the presence of her guardian, who was a subscribing witness to it; and the marriage was soon after solemnized, with the privity and consent of the guardian. Miss Tyrrell was only entitled to a portion of £2000. Sir Thomas Drury died intestate, being seised in fee of a considerable real estate, leaving two daughters. Lady Drury, upon the death of her husband, insisted that, as she was an infant at the time of executing the aforesaid indenture, and at the time of the solemnization of her marriage, she was not bound to accept of the provision thereby made for her, but was entitled to dower. The two daughters of Sir Thomas Drury filed a bill in Chancery against Lady Drury, praying that she might be restrained from claiming dower. The cause was heard before Lord Chancellor Henley, who decreed that Lady Drury was entitled to dower. (a)

On an appeal to the House of Lords, after hearing counsel, the following question was put to the judges:—"Whether a woman married under the age of twenty-one years, having before such marriage a jointure made to her, in bar of her dower, is thereby bound, and barred of dower within the Statute 27 Hen. VIII. c. 10?"<sup>1</sup>

(a) *Earl of Bucks v. Drury*, 3 Bro. Parl. Ca. 492.

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<sup>1</sup> On this case, Mr. Roper observes as follows:—"The argument on this point ultimately depended, in a great measure, upon the question whether the agreement of the wife to a legal jointure made before marriage was necessary, to make it binding upon her, under the statute. It is not required that the wife should concur in the settlement by which the jointure is made, (see 1 Cruise, Dig. 228;) and it is not in terms required that she should assent to it. But from the provisions of the statute as to settlements made after marriage, it is clear that it was not intended to enable the husband by his own act to impose on the wife in lieu of her dower any jointure which he might think fit. The legislature seems to have assumed that all antenuptial jointures must be settled by agreement of the parties, and there seems some reason for contending that without such agreement the jointure would not in strictness be within the act, as by the common law the estate conveyed to the wife, by way of jointure, would not be effectually vested in her, without an actual or presumed acceptance on her part. If it was made with her privity, her marrying with notice of it, would of course be an acceptance of the settlement and conclusive evidence of her agreeing to it. *Estcourt v. Estcourt*, 1 Cox, 20. But if it was made without her privity, she had the power of disagreeing

Mr. Baron Gould, Lord Chief Baron Parker, and Lord Chief Justice Pratt, delivered their opinions in the negative. But the rest of the judges,—namely, Mr. Justice Wilmot, Mr. Justice Bathurst, Mr. Baron Adams, and Mr. Baron Smythe, delivered their opinions in the affirmative. Lord Hardwicke and Lord Mansfield also delivered their opinions in the affirmative, whereupon the decree was reversed. (a)

(a) *Vide* Sir E. Wilmot's Notes, 177.

to the estate conveyed to her, as soon as she became *sui juris*, and was apprised of the fact. Her disagreement would render the conveyance void, and it would seem that a jointure thus prevented from taking effect, would not bar her right of dower under the statute. It was, however, determined that a legal jointure was to be considered, not as a compensation for dower agreed for by the wife, but merely as a provision conferred upon her, and that it was not founded on any idea of contract; and hence it followed that in the case of the wife being an infant, no objection arose from her incapacity to contract. See 2 Eden, 62, 72.

“Mr. Justice Wilmot, in his judgment, entered fully into the discussion of this question. He observed that the bar to the right of dower did not arise from the agreement of the woman to a jointure made before marriage, but from the energy and force of the act of parliament substantiating the settlement against her for this particular purpose. Wilmot's Opinions, p. 194. He thought that the meaning of the legislature with respect to women then married, was, that those who had settlements made before their marriages should acquiesce under those settlements, and abide by the provisions thereby made for them, whether they were great or small, adequate or inadequate, whether they had been made by the agreement of themselves or their friends, or had been the mere spontaneous act of the husband or his ancestors,—p. 202. The objection that the husband might before marriage settle an inadequate jointure on the wife without her assent or knowledge, for the purpose of depriving her of dower, did not, as he observed, apply to cases of jointures made before the statute, as a fraud of that description could not then have been contemplated. But in cases subsequent to the statute, he thought that such jointures would be void on the ground of fraud; that the fraud might be pleaded at law, and that the fairness and competency would be a question to be decided by a jury, taking into consideration all the circumstances of the transaction. ‘A pocket jointure,’ he added, ‘made upon a woman, without her privity, or upon an infant with her privity, but without the interposition of parents or guardians, would be such an evidence of fraud as would be sufficient to condemn it.’”

“Lord Hardwicke considered that, though the statute spoke only of jointures out of freehold estates, yet that a fair and certain provision out of any other species of property would be a good equitable jointure, and consequently a bar of dower. At the date of the statute, freehold estate in land was the kind of property chiefly regarded, and the statute, therefore, applied to that only. But many other species of property had since grown up, by new improvements, commerce, and from the funds. Equity had, therefore, held that when such provisions had been made before marriage out of *any of these*, the wife should be bound; and he instanced particularly settlements of trust estates, copyholds, and money in the funds. And he held that such provisions, when settled on infants with the consent of parents or guardians, were equally binding as when settled on adults. 2 Eden, 65, 66.” See Roper on Husband and Wife, Vol. I. p. 477—480, notes. *Williams v. Chitty*, 3 Ves. 545.

37. The principle upon which this case was determined is that a jointure being a *provisione viri*, and not *ex contractu*, the consent of the intended wife is not a circumstance required by the statute, to render a jointure valid. Lord Mansfield, in delivering his opinion in the House of Lords, on this case, said that a jointure was not a *contract* for a provision, but a *provision* made by the husband, as defined by Lord Coke; so the consequences drawn from the infant's incapacity of contracting were ill-founded. It is, therefore, now held that the intended wife need not be a party to the deed by which the jointure is limited. And in an opinion of the late Mr. Fearne's, he says, "I discover nothing in the Statute 27 Hen. VIII. of jointures, that requires the wife being a party to the deed which secures her jointure; and some of the cases said to be within that statute seem rather against such a conclusion." (a)

200\* 38. It is, however, necessary, I conceive, that the intended wife, or, where she is under age, that her guardians † should have notice of the jointure limited to her; for otherwise she may be defrauded by the settlement of a jointure inadequate to her rank and fortune; in which case there can be no doubt but that she would be relieved in equity. (b) <sup>1</sup>

39. [If the interest in the property settled by way of jointure,

(a) 4 Bro. C. C. 506. n. 2 Eden, 60. (Caruthers v. Caruthers, 4 Bro. C. C. 500. McCartee v. Teller, 2 Paige, 511.) Jordan v. Savage, ante, 2 Ab. Eq. 101.

(b) Estcourt v. Estcourt, 1 Cox, R. 20. 3 Atk. 612.

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[† It does not appear that the concurrence of guardians is indispensable if the jointure be in other respects free from legal objections. Earl of Bucks v. Drury, *ubi supra*. See, also, Drury v. Drury, Co. Lit. 36, b. note 7; Williams v. Chitty, 3 Ves. 545—551.]

<sup>1</sup> The subject of jointures has been regulated by statute, in several of the United States. Thus, in *Massachusetts*, a jointure, in the sense of the common law, or any pecuniary provision, made before marriage, in lieu of dower, is an effectual bar of the claim of dower; but to this end it must, in either case, have the consent of the wife, expressed, if she is of full age, by her becoming party to the deed, and if under age, by her joining with her father or guardian in the conveyance. *Massachusetts*, Rev. St. ch. 60, § 8, 9. And see *Hastings v. Dickinson*, 7 Mass. 153. [*Vincent v. Spooner*, 2 Cush. 467, 473.] Such is also the law of *New York*, Rev. St. Vol. II. p. 27, 3d ed.; *McCartee v. Teller*, 2 Paige, 559; and of *Arkansas*, Rev. St. 1837, ch. 52, § 9, 10, 11; and of *Indiana*, Rev. St. 1843, ch. 28, § 96, 97, 98; and of *Maine*, Rev. St. ch. 95, § 10, 11. If such settlement is made without her consent, or after marriage, it will still be binding, unless she expresses her dissent within a certain period after her husband's death, limited in the statutes; which, in *Massachusetts*, *Maine*, and *New York*, is six months, and in *Arkansas*, is one year. In *Connecticut* and *Delaware*, any estate, real or

or the amount of the property itself, be *uncertain* or *precarious*, of course the *infant* will *not be bound*, as under such circumstances the jointure would not be binding upon an adult.] †

40. We have seen that an estate in fee, in tail, or for life, may be limited to a woman for her jointure. In case of a limitation in fee, I conceive that a jointress would have full power to dispose of it as she pleased. But where an estate tail is limited to a woman for her jointure, she is prohibited by the Statutes 11 Hen. VII. c. 20,‡ and 32 Hen. VIII. c. 36, from alienating or creating a discontinuance of it by feoffment, fine, or recovery. (a)

41. Where lands are limited to a woman for her life, by way of jointure, she is *not allowed to commit waste*; and will be restrained from it by the Court of Chancery, in the same manner as other tenants for life. (b)

42. On a motion to stay a jointress, tenant in tail after possibility, &c., from committing waste, the Court held, that as she was a jointress within the Statute 11 Hen. VII. she ought to be restrained, being part of the inheritance, which by the statute

(a) Tit. 36. c. 10.

(b) Bassett v. Bassett, Finch, 189. Tit. 3. c. 2.

personal, received by antenuptial agreement in satisfaction of the claim of dower, is a bar to such claim, if the wife were of age at the time of the settlement. Conn. Rev. St. 1838, p. 190, and Rev. St. 1821, tit. 26, § 5; Andrews v. Andrews, 8 Conn. Rep. 79; Delaware, Rev. St. 1829, p. 165.

In *Rhode Island* and *Kentucky*, the conveyance of any estate, real or personal, to the wife, whether by deed or will, in lieu of dower, to take effect immediately on the death of the husband, either for her life, or in fee, determinable by such acts only as would work a forfeiture of dower at common law, will bar her right of dower. But if the conveyance is made before marriage, and the wife is then an infant, or if it is made during coverture, she may waive it, and claim her dower. R. Island, Rev. St. 1844, p. 191; Kentucky, Rev. St. Vol. I. p. 575, 576. A similar provision exists in the statute of *Virginia*, 1785, ch. 65, Tate's Dig. p. 176, 177; except that by the omission of the words "real or personal," it would seem restricted to real estate alone. In *Pennsylvania*, as Chancellor Kent remarks, it is left as a doubtful question, whether the settlement of personal estate would be sufficient to bar dower, and be held equivalent to a jointure. But the case of *Drury v. Drury*, holding that an infant's dower may be barred by jointure, seems, however, to be assumed as the settled law. Shaw v. Boyd, 5 S. & R. 309. See 4 Kent, Comm. 56, note a.

[† Caruthers v. Caruthers, 4 Bro. C. C. 500; Smith v. Smith, 5 Ves. 189; Corbet v. Corbet, 1 Sim. & Stu. 612; 5 Russ. 254.]

[‡ The above Statute, 11 Hen. VII. c. 20, is repealed, (except as to lands in settlements before the 28th August, 1833,) by the recent statute for abolishing fines and recoveries, 3 & 4 Will. 4, c. 74, s. 16, 17.]

she is prevented from alienating; and, therefore, granted an injunction against wilful waste. (a)

43. Where there is a covenant that a jointure shall be of a certain yearly value, though the estate be not limited without impeachment of waste, yet the Court of Chancery will not restrain the jointress from committing waste, so far as to make up the defect of the jointure. (b)

201 \* 44. Where the jointress and the issue claim under the same settlement, they shall *contribute* proportionably in the discharge of any prior incumbrance on the estate. (c)

45. A jointress is *not entitled to the crops* sown at the time of her husband's death; because a jointure is not a continuance of the estate of the husband, like dower. (d)

46. It appears from a passage in Jenkins,† that an estate limited to a woman by way of jointure is not liable to debts due to the crown.

47. The inconveniences attending a limitation of land by way of jointure are so numerous, that it has long become a general practice to limit a rent charge to the intended wife, for her life, as a jointure, to commence on the death of the husband, with powers of distress and entry, and a term for years, for further securing the payment of it, which has been found by experience to be much more convenient both to the widow and to the heir; as a more certain income is thereby provided for the former, and the latter continues in the possession and management of the whole estate.

48. There is a proviso in the Statute 27 Hen. VIII. c. 10, s. 7, "That if any such woman be lawfully *expulsed or evicted* from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expulsed shall amount or extend unto." (e)¹

(a) Cook v. Windford, 1 Ab. Eq.\*221.

(c) Carpenter v. Carpenter, 1 Vern. 440.

(e) (Ambler v. Weston, 4 H. & Munf. 23.)

(b) Carew v. Carew, 1 Ab. Eq. 221.

(d) Fisher v. Forbes, 9 Vin. Ab. 373.

[† Page, 226.]

¹ This provision, with the general features of this statute, on the subject of jointures,



49. A person, in consideration of a marriage before had, covenanted to stand seised to the use of himself and wife, during their natural lives, and the life of the longest liver. The lands were evicted during the life of the husband; it was held that the eviction during the coverture was sufficient to entitle the wife to a recompense, though she had accepted the residue of the jointure after the death of her husband. (a)

50. A jointure was settled before marriage; the husband, during the coverture, purchased other lands, sold them again, and died. The jointure lands were evicted; held, that the wife should have dower of the lands which were purchased, and aliened by her husband, at the time when she was barred of her action for dower. (b)

\*51. [This right of the widow upon eviction is the same, \*202 whether the jointure is before or after marriage. (c)]

52. The effect of eviction is to remit her to her dower *pro tanto*; if the value of the dower be greater than that of the jointure, she can recover only the amount of the latter; and if the jointure be greater, she can only recover to the amount of her dower; and she will only be entitled to hold the lands recovered during life, though the jointure might have been settled in fee or in tail. (d)

53. But if the jointure were settled before marriage, and the wife, being adult, relinquishes her dower; in case of eviction she would, in equity, be precluded from claiming it against a purchaser of other lands of the husband not charged with the jointure. (e)

54. The consequences of eviction of equitable jointure seem to be the same as if it were legal. The widow also in case of eviction may avail herself of any remedies she may have against her husband's assets by covenant or otherwise.] (f)

(a) Gervoye's case, Moo. 717.

(b) Maunsfield's case, 1 Inst. 33 a. n. 8.

(c) Gervoye's case, *supra*, 1 Vern. 427. Beard v. Nutthall, 1 Vern. 427.

(d) 1 Sim. & Stu. 620. 1 Vern. 427. 3 Bro. C. C. 489. 1 Ves. jun. 451. 4 Co. 3. b.

(e) Simpson v. Gutteridge, 1 Mad. 609.

(f) 2 Eden, 68. 3 Bro. C. C. 489. 1 Ves. jun. 452. Beard v. Nutthall, *ubi supra*.

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is believed to have been adopted in most, if not all, of the United States, where the common-law doctrine of dower is recognized. But whether this particular provision is in force in *New York*, is thought by Chancellor Kent to be doubtful. See 4 Kent, Comm. 56, note a. [Bliss v. Sheldon, 7 Barb. Sup. Ct. 152.]

## CHAP. II.

## WHERE A JOINTRESS IS AIDED IN EQUITY.

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| SECT. 1. <i>A Jointress is deemed a Purchaser.</i><br>4. <i>Though the Settlement be unequal.</i><br>7. <i>Relieved against a voluntary Conveyance.</i><br>8. <i>[Not against a bonâ fide Purchaser without Notice.</i><br>9. <i>Relieved where a Power to Jointure defectively exercised.]</i> | SECT. 10. <i>And against a satisfied Term.</i><br>11. <i>Not bound by Neglect during the Coverture.</i><br>14. <i>Not to deliver Title Deeds.</i><br>17. <i>Sometimes allowed Interest for Arrears.</i><br>18. <i>Effect of a Covenant that the Lands are of a certain Value.</i> |
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SECTION 1. A jointress is considered in equity as a *purchaser for valuable consideration*, even though she brought her husband no fortune; marriage alone being deemed a valuable consideration, from which it follows that a jointress is entitled to the aid and assistance of a Court of Equity; so that wherever there appears to have been an agreement to settle a jointure, a specific performance of it will be decreed.

2. A man agreed, by articles, to settle certain lands before marriage, on his intended wife, for her jointure. The marriage took effect, but the husband died before any settlement was made; the wife brought her bill for an execution of the articles. It was contended, that as the agreement was to make a settlement *before* marriage, and as the plaintiff married without requiring such settlement, it amounted to a waiver of the articles, and a release in law; an execution of them was, however, decreed. (a)

3. Lord Hardwicke has said, that in marriage contracts, where the fortune of the wife is paid to the father, or to clear  
 204\* incumbrances, \* or to the son, and the father and son are

(a) Hayner v. Hayner, 1 Vent. 343. Coventry v. Coventry, 2 P. Wms. 222.

parties to the marriage contract, the wife has a lien upon both the estate of the father, and that of the son. (a)

4. Although a *settlement be very unequal*, and much in favor of the wife, yet a Court of Equity will not relieve against it; because it cannot put the wife into her former situation.

5. A, upon treaty of marriage with M, the daughter of B, was to settle £500 a year upon her, and to have £5000 portion. But B, insisting that if A should die without issue, his daughter should have the inheritance of the jointure, that was refused. Afterwards A renewed the treaty himself, *accepted* of articles for payment of £5000, and settled a jointure of £500 a year. He likewise made another deed in the nature of a mortgage of all his estate, as well the reversion of the jointure, as the rest, for securing the payment of £5000 to her, in case A died without issue. A died in a fortnight after the marriage, without issue. M, by bill, prayed a foreclosure of the mortgage. The defendants, though they exhibited their bill for relief against this as a fraud, were decreed to pay the £5000 without interest. (b)

Upon an appeal to the House of Lords, it was argued that A was a sickly and weak man; that the agreement was unreasonable; that A, on his death-bed, declared he had made no such agreement, and that M, being present, did not contradict it. To which it was answered, that all bargains were not to be set aside, because not such as the wisest people would make; but there must be fraud to make their acts void. That the marriage was of itself a good consideration for a jointure; and reasonable or unreasonable was not always the question in equity, if each party was acquainted with the whole, and meant what they did; much less was it sufficient to say that it was unreasonable, as it happened in event. For if at the time it was a tolerable bargain; nay, if at the time, the bargain was the meaning of the parties, and each knew what was done, and there was no deceit upon either, it must stand. The decree was affirmed.

6. A person brought a bill to be relieved against a jointure, made previous to, and in consideration of marriage, by a tenant for life, in pursuance of a power, he being then upon his death-bed. Lord Parker, assisted by Lord Chief Justice Pratt and the Master of the Rolls, denied relief. (c)

(a) 1 Atk. 440.

(b) *Whitfield v. Taylor*, Show. Parl. Ca. 20.

(c) *Wicherly v. Wicherly*, 2 P. Wms. 619. *Prime v. Stebbing*, *infra*, c. 3. s. 10.

205 \* \*7. A jointress will be *relieved* in equity, as also at law, *against a prior voluntary conveyance*; <sup>1</sup> because, as has been already stated, she is considered as a purchaser for a valuable consideration. And by a statute which will be stated in a subsequent title, all voluntary conveyances are declared fraudulent and void as against such purchasers. (a)

8. [But equity will *not* decree the performance of an agreement to settle a jointure upon the wife *against a bonâ fide purchaser* for a valuable consideration, *without notice*; because he has equal equity with herself, and has obtained the legal interest in the estate. (b)]

9. Where a *power* to jointure is *defectively executed*, Courts of Equity will relieve the jointress, by supplying the defects in the execution; and it is immaterial whether the intent to execute the power be by letter, memorandum, will, articles, or covenant.† But if the intent to execute the power be uncertain, Courts of Equity will not interfere; since evidence of such intention is as necessary in the defective, as it is in the regular execution of a power.] (c)

10. A Court of Equity will also *set aside a satisfied term* for

(a) Tit. 32. c. 28. s. 2.

(b) 2 Vern. 271, 599. 2 P. Wms. 681. 1 Atk. 571. 2 Bro. C. C. 66.

(c) Jackson v. Jackson, 4 Bro. C. C. 462. Elliot v. Hele, 1 Vern. 406. 2 Ch. Ca. 28, 29, 87.

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<sup>1</sup> In the United States, this doctrine is essentially modified, it being now held, as the better doctrine, that the title of a prior voluntary grantee is good, in the absence of fraud, against a subsequent purchaser for valuable consideration, with notice of the prior conveyance. See 4 Kent, Comm. 463, 464, and cases there cited; 1 Story, Eq. Jur. § 424—435; Cathcart v. Robinson, 5 Pct. 280; Ricker v. Ham, 14 Mass. 137, 139; Jackson v. Town, 4 Cowen, 603; Sterry v. Arden, 1 Johns. Ch. 261; Hudson v. Wilder, 4 McCord, 294. But it is the settled American law that a subsequent purchaser, who acquires his title in good faith and for a valuable consideration, without notice, is protected under the Statutes of 13 & 27 Eliz., which have been adopted as part of our common law, whether he purchases from a fraudulent grantor or a fraudulent grantee; and that there is no difference, in this respect, between a conveyance to defraud subsequent creditors, and one to defraud subsequent purchasers. But notice of the prior voluntary conveyance affects the subsequent purchaser with bad faith, and vitiates his title. And where the purchaser knows that the purpose of the grantor is to defraud creditors or others, the title of the purchaser is void as against them, even though he pays a full valuable consideration. \* 4 Kent, Comm. 464; Edgall v. Lowell, 4 Verm. R. 405.

[† Tollet v. Tollet, 2 P. Wms. 490; Sergeson v. Sealey, 2 Atk. 415; Wade v. Paget, 1 Bro. C. C. 363, 2 Ball & B. 44; Coventry v. Coventry, 2 P. Wms. 222; Vernon v. Vernon, Amb. 1.]

years in favor of a jointress, though it will not do so in favor of a dowress, the reason of which will be stated in a subsequent title. (a)

11. The *neglect* of a married woman *during coverture* will not affect her rights; and a Court of Equity will, notwithstanding, assist her, in case her jointure proves deficient.

12. The plaintiff's husband, after marriage, entered into a voluntary bond to settle a jointure; and accordingly settled lands, upon which the bond was delivered up. The husband died, and the jointress was evicted. It was resolved that the jointure should be made good out of the personal estate, unless the plaintiff recovered dower; for this agreement, though voluntary, ought to be decreed by the Court. And the delivery up of the bond by a feme covert could in no way bind her interest. (b)

13. A person made a settlement on his son for life, remainder to his first and other sons in tail, with power to appoint any of \*the lands, not exceeding £100 a year, to any \*206 wife he should marry, for a jointure. The father died, the son married, and after marriage, appointed certain lands to trustees, in trust for his wife, for a jointure; and covenanted, that if they were not of the value of £100 a year, he would, upon request made to him any time during his life, make them up out of the other lands. The husband lived several years; no complaint was made that the lands were not of that value, nor any request to make it up. On a bill brought by the widow to have the jointure made up £100, Lord Keeper Wright said, that a provision for a wife, or children, was not to be considered as a voluntary covenant; and, therefore, decreed the deficiency to be made up, notwithstanding the wife's neglect in not requesting it during the coverture; for the laches of a feme covert could not be imputed to her. (c)

14. If a bill is brought by an *heir at law*, or any other person, against a jointress, whereby the party would avoid the jointure, under pretence that his ancestor had not a sufficient title to make it; and *seeks a discovery of deeds* and writings, whereby he would *avoid* the title of the jointress; he will *not be allowed to have such discovery*, though the jointure be made after marriage,

(a) Tit. 12. c. 3. s. 89, &c.

(b) *Beard v. Nuttall*, 1 Vern. 427.

(c) *Fothergill v. Fothergill*, 1 Ab. Eq. 222.

unless he by his bill submits to confirm the title of the jointress ; and then he shall. (a)

15. On a motion that all deeds, leases, and writings, relating to the inheritance, should be delivered up, on confirming a jointure ; it was opposed as to the leases, because without them the jointress could not recover the rents ; and though the leases should be expired, there might be arrears of rent, and covenants. The Court ordered all deeds and writings, and expired leases, to be delivered up ; unless particular reasons were shown to the contrary. (b)

16. The Court of Chancery will not oblige a widow to produce the deed under which she claims her jointure, on the bare offer of confirming it ; but it must be absolutely confirmed. (c)

17. *Interest is not in general allowed* for arrears of a jointure ; but the Court will expect a special case to be made for that purpose.† (d)

207 \* \* 18. If a husband *covenants* that the lands limited in jointure are of a *certain yearly value*, and they afterwards prove deficient, the covenant will be decreed to be performed in specie. And although such a covenant be inserted *in articles only*, and not in the settlement made in pursuance of them, yet it will be considered as subsisting in equity.

19. A jointress brought her bill to have an account of the real and personal estate of her late husband ; and to have satisfaction for a defect of value of her jointure lands ; which he had covenanted to be, and to continue, of a certain yearly value. The defendant insisted that this was a covenant which sounded only in damages, and was, therefore, properly determinable at law. Though it was admitted that a Court of Equity cannot regularly assess damages, yet it was determined that in this case a Master might properly inquire into the amount of the defect, and report it to the Court, which might send it to be tried at law, upon a *quantum damnificat*. (e)

(a) *Towers v. Davys*, 1 Vern. 479. *Supra*, p. 107, and note.

(b) *Lomax v. —*, Sel. Ca. in Cha. 4.

(c) *Leech v. Trollop*, 2 Ves. 662.

(d) *Anon.* 2 Ves. 261. See 2 Ves. jun. 167. *Tew v. Winterton*, 1 Ves. jun. 451.

(e) *Hedges v. Everard*, 1 Ab. Eq. 18.

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[† See Lord Redesdale's observations upon this subject, in *Anderson v. Dwyer*, 1 Scho. & Lef. 303.]

20. Where lands, settled for a jointure, are covenanted to be of a certain clear yearly value, and after the death of the husband they prove deficient, the jointress is entitled to have the deficiency made good, out of the other lands ; and to come in as a specialty creditor, upon the husband's estate, for the arrears of the deficiency, with interest. (*a*)

21. Where, in marriage articles, the lands agreed to be limited in jointure are expressed, but not covenanted, to be of a certain yearly value, and afterwards prove deficient ; this amounts to an agreement that they were of that value ; and is a sufficient foundation for making up the deficiency. (*b*)

(*a*) *Parker v. Harvey*, 2 Ab. Eq. 241. 4 Bro. Parl. Ca. 604. · *Eustace v. Keightley*, 4 Bro. Parl. Ca. 588.

(*b*) *Glegg v. Glegg*, 2 Ab. Eq. 27. 4 Bro. Parl. Ca. 614. *Probert v. Morgan*, 1 Atk. 440.

## CHAP. III.

## WHAT WILL OPERATE AS A BAR OR SATISFACTION OF A JOINTURE.

SECT. 1. <i>Fine or Recovery by the Wife.</i>	SECT. 12. <i>Unless so expressed, when the</i>
3. <i>Not barred by Attainder of the</i>	<i>Widow has an Election.</i>
<i>Husband.</i>	14. <i>A Devise sometimes held a</i>
4. <i>Nor by Elopement of the Wife.</i>	<i>Satisfaction.</i>
7. <i>A Devise is no Bar to Jointure.</i>	

SECTION 1. Where a jointure is settled on a woman before marriage, pursuant to the statute, it so far resembles dower, that it cannot be defeated by the *alienation of the husband alone*, or be charged with any incumbrances created by him, after the marriage. But if a *wife joined with her husband* in levying a fine, or suffering a common recovery, of the lands settled on her as her jointure, or out of which the jointure was to issue, she would be thereby barred of such jointure, upon the same principle as that by which a fine or recovery would bar her of dower.† (a)

2. If the jointure, whereof the wife levied a fine or suffered a recovery, were made before marriage, the wife would then be barred, not only of the jointure, but also of her claim to dower. But if the jointure were made after marriage, a fine or recovery by the husband and wife, of such jointure, would not bar the wife of her right to dower. For in the first case, the jointure having been made before marriage was not waivable; whereas, in the second case, it was waivable, and the time of her election came not till after the death of her husband; so that she might claim her dower in the rest of his lands. (b)

209 \* 3. A jointure is in several cases more favored in law than dower; for although the *husband commit treason or felony*, yet his widow will be entitled to her jointure. But if

(b) Tit. 6. c. 4. s. 13.

(b) 1 Inst. 37. a. Dyer, 358. b. *Ante*, c. 1.

[† Fines and recoveries are abolished by Stat. 3 & 4 W. 4, c. 74. This act does not extend to Ireland, except where expressly mentioned.]



the widow be attainted of either of these crimes, she will lose her jointure. (a)

4. A jointure is not barred or forfeited by the *elopement* of the wife from her husband, and her *living in adultery*, nor will these acts even preclude her from obtaining relief in equity.<sup>1</sup> (b)

5. A woman brought a bill against her husband, for a specific performance of her marriage articles, whereby he had agreed that a jointure should be settled on her. The defendant answered that the plaintiff had withdrawn herself from him, lived separately, and very much misbehaved herself. It was proved that the plaintiff did elope from her husband and went with another man to a cottage about three miles from her husband's house; since which there had been no pretence of a reconciliation. So that this was a bar of dower at common law; therefore equity ought not to assist such a woman. Lord Talbot observed, that the fact of adultery was not put in issue, the accusation being only general and uncertain. But the articles being that the husband should settle such and such lands in certainty upon his wife, for her jointure, this was pretty much in the nature of an actual and vested jointure; as what was covenanted for a good consideration to be done, was in most respects considered in equity as actually done; consequently this was a jointure, and not forfeitable, either for adultery or elopement. The reason why a wife forfeited her dower by an elopement with an adulterer, and yet the husband did not, by leaving his wife, and living with another woman, forfeit his estate by the curtesy, was, because the Statute of Westminster 2, does, by express words, create a forfeiture in the one case, and not in the other. Decreed that the husband should perform the articles. (c)

6. In a modern case, where a bill was filed by trustees, praying a performance of marriage articles, the husband resisted, so far as the articles made a provision for the wife; alleging and proving that she lived separate from him, in adultery. Lord Thurlow was of the opinion that this was not a reason for non-

(a) 1 Inst. 37. a. And see Stat. 54. G. 3. c. 145.

(b) (4 Kent, Comm. 54, 55.)

(c) *Sidney v. Sidney*, 3 P. Wms. 269. (4 Kent, Comm. 56.) Tit. 6. c. 4. s. 4—9.

<sup>1</sup> In some of the United States, it is expressly enacted that a jointure, devise, or other provision in lieu of dower, shall be forfeited by any cause which would be a forfeiture of the dower at common law. See *N. York*, Rev. St. Vol. II. p. 27, 3d ed. *Arkansas*, Rev. St. ch. 52, § 15. *Indiana*, Rev. St. 1843, ch. 28, § 103.

performance of the articles, as to the wife. Decreed accordingly. (a)

210 \* \* 7. The principles laid down in the preceding title as to the effect of devises in barring dower, have been adopted with respect to jointures. So that a *general devise of other lands*, or of personal property, by a husband to his wife, *would not* [before the late statute for amending the law of dower] *operate as a bar* to a jointure, settled on the wife, either before or after marriage.† (b)

8. A man, on his marriage, gave a bond to a trustee in the penalty of £4000, conditioned that if he, at any time within four months, should settle and assure on his wife freehold lands of the yearly value of £100, then the bond to be void.

214 \* The husband soon after the marriage made his will, devising thereby freehold and copyhold lands, lying intermixed in Norfolk, to his loving wife and their heirs; and died within four months after her marriage. (c)

Master of the Rolls,—“As money and lands are things of a different nature, the one shall not be taken in satisfaction of the other. Whatever is given by a will is *prima facie* to be intended a bounty and benevolence; and it is remarkable that in the present case the devise is to his loving wife, which is a term of affection. The devise of such of the land as is copyhold cannot possibly be towards satisfaction of the £100 *per annum*, which was to be freehold; nay, supposing the whole £88 *per annum* were freehold, it would not go towards satisfaction of the £100 *per annum*; not being so expressed. And supposing there were assets to pay all the bond debts, and likewise the charges laid by the will on the land, in such case the £88 *per annum* should be enjoyed as a bounty and benevolence.”

9. A father and son, upon the marriage of the son, covenanted that the lands settled on the son's wife, for her jointure, were worth £300 *per annum*. The son gave by his will a legacy of £1000 to his wife. On a bill brought by the wife to have a de-

(a) Blount v. Winter, cited 3 P. Wms. 277. See also Seagrave v. Seagrave, 13 Ves. 439, 443.

(b) Tit. 6. c. 4. s. 19, 33, and note (b.) Grove v. Hook, 4 Bro. Parl. Ca. 593.

(c) Eastwood v. Vincke, 2 P. Wms. 613.

[† But as regards dower in respect of devises of real estate to the widow, the law is now altered. See Stat. 3 & 4 Will. 4, c. 105, s. 9, 10, *supra*, p. 161, note.]

ficiency in her jointure supplied out of the assets of her husband and of his father, and also for the legacy of £1000, Lord Hardwicke held that the legacy of £1000 given by the will ought not to be considered in this case as a satisfaction for the deficiency of her jointure, because that did not arise till after his death, and, therefore, could not at the time be in his consideration; and as the jointure lands were covenanted by the marriage settlement to be worth so much, clear of all reprises, the testator plainly intended the £1000 as a bounty for her. (a)

10. John Sheppard having by his marriage articles covenanted that the lands settled on his wife were of the annual value of £1600 above all incumbrances, made his will in these words:—"I do hereby ratify and confirm my marriage articles; and I do also give to my wife the lands in A B for life." The wife and her second husband brought a bill to have a deficiency in her jointure lands supplied, which was not disputed; but it was insisted that the lands devised should be taken instead thereof.

(Lord Hardwicke, upon consideration of the whole will, was of opinion that the testator did not intend to give the lands in A B as a satisfaction of what the wife was in strictness of law entitled to, under the articles; but clearly as an accumulated bounty. He, therefore, directed an inquiry into the deficiency of the jointure, and decreed it to be made good out of the estate.) (b)

11. Sir B. Broughton, by articles previous to and in consideration of his marriage with Miss Hill, covenanted that in consideration of the said marriage, and of £10,000, her marriage portion, he would convey certain lands in the county of Chester to trustees, to the use of himself for life, and to secure an annuity of £1000 to Miss Hill for her jointure, and in bar of dower; remainder to his first and other sons in tail; remainder to his own right heirs. The marriage took effect, and Sir B. Broughton received the £10,000 portion; but no settlement was ever executed pursuant to the articles. Sir B. Broughton having sold a large estate in Lincolnshire for £27,000, and having contracted for the purchase of several considerable estates in Hampshire, by his will gave to Lady Broughton a leasehold house in London, in which he resided, with all the furniture thereof; and also devised to her and her heirs all the estates in Hampshire for

(a) *Probert v. Morgan and Clifford*, 1 Atk. 440.

(b) *Prime v. Stebbing*, 2 Ves. 409.

the purchase of which he had contracted, or in lieu thereof the whole money arising from the sale of his estates in Lincolnshire. He then devised his estates in Cheshire, which were liable to the jointure, to trustees, to the intent that C. Shrimpton should receive thereout an annuity of £20, and subject thereto, 217 \* to the \* use of Sir Thomas Broughton, his heir at law, for life, remainder to his first and other sons in tail male, remainder over.

Upon the death of Sir B. Broughton, Lady Broughton entered on the estate thus devised to her; and the heir at law having refused to pay her jointure, she filed a bill, praying a specific execution of her marriage articles, so far as related to her jointure; to which the heir at law put in his answer insisting that what was given by the will to Lady Broughton, was in satisfaction for what she was entitled to under the articles; and that she could not have both provisions.

The cause was heard before Lord Bathurst, who decreed that Lady Broughton was entitled to have her jointure agreeable to the articles. And on appeal, this decree was affirmed. (a) † 220 \* \* 12. But where a freehold estate was devised to a woman *expressly for her jointure*, and in bar and satisfaction of a jointure settled on her, either before or after marriage; in such case the widow could not have both, for that would contradict the will; but she *must make her election*.

13. Robert Pitt, by articles in consideration of marriage, agreed to lay out £10,000 in the purchase of land, to be settled to the use of the plaintiff Harriet, his intended wife, for her life, for her jointure. The marriage took place; afterwards, the father of R. Pitt gave him an estate for life, with power to grant a rent charge of £400 a year to any woman he should marry, for her jointure. In pursuance of this power, Robert Pitt granted a rent charge of £400 a year to his wife, to commence after his decease, in satisfaction of part of her jointure. Three days after, he conveyed a leasehold estate of £200 a year in trust for his wife;

(a) Broughton v. Errington, 7 Bro. Parl. Ca. 461.

[ † Upon the subject of performance and satisfaction of the husband's covenant to settle lands in jointure, see a more detailed discussion in Roper's Husband and Wife, Vol. I. p. 509, Jacobs's ed.]

and by his will he confirmed the grant of the rent charge, and the conveyance of the leasehold settled on his wife, by way of addition or augmentation, and in full compensation of her jointure. It was held, that this was a satisfaction of the jointure provided by the articles, according to the intention of Robert Pitt; that the plaintiff should make her election, whether to have the rent charge of £400 and the leasehold, or the £10,000 laid out in lands. (a)

14. Although a devise be not expressly mentioned to be in bar of a jointure, yet if it should *appear, from any circumstances in the will*, to have been the intention of the testator that such devise was meant as a satisfaction for the jointure; a Court of Equity would, I presume, reason by analogy from the cases in which a devise has been held a satisfaction for dower, and compel the jointress to make her election. (b)

15. There is one case where there was a deficiency in a jointure, and the husband having devised lands to the jointress for her life, and also a sum of money, such devise and bequest were held to be a satisfaction for the deficiency of the jointure.

16. Lord Montague, on the marriage of his son Francis, settled estates to the use of the lady for her life, for her jointure; the lands so settled were covenanted to be of the yearly value of £1000. After the death of Lord Montague, the honor and estate descended to Francis, who devised other lands of about £500 a year to his wife for her life, together with a legacy of \*£500, and part of his household goods; after- \*221 wards Francis, Lord M., being minded to make some further provision for his lady, revoked the uses of some part of his estates, and limited the same to trustees, in trust, to raise £10,000 for her. By a codicil he devised to her an annuity of £500 a year during her life. Upon his death his widow brought her bill in Chancery, to have a deficiency in her jointure made up. Lord Cowper declared that the legacies, which were admitted to be of greater value than the deficiency in the jointure, ought to be taken in satisfaction of the breach of covenant. (c)

17. It is observable that this case was prior to that of *Prime v. Stebbing*, and is not reconcilable to it. The decree appears

(a) *Grandison v. Pitt*, 2 Ab. Eq. 392.

(b) Tit. 6. c. 4. s. 29.

(c) *Montague v. Maxwell*, 4 Bro. Parl. Ca. 598. 2 Ab. Eq. 421.

to have been made upon the ground that Francis, Lord M., was a very weak man, and under the influence of his wife. For upon an appeal to the House of Lords, it was ordered that the Court of Chancery should direct an issue to try whether Lord M. was sane at the time of the execution of the codicil; and a verdict was found that he was not of sound mind then.† (a)

(a) *Ante*, s. 10.

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[† Upon the subject of satisfaction of debts by testamentary benefits, see the Editor's edition of Roper's *Legacies*, 1828, Vol. II. ch. 17, s. 1, 2.]

## TITLE VIII.

## ESTATE FOR YEARS.

## BOOKS OF REFERENCE UNDER THIS TITLE.

COKE upon LITTLETON, 43. b.—54. b.

WOODFALL'S Law of Landlord and Tenant. (Wollaston's edition.)

COMYN'S Law of Landlord and Tenant. (Chilton's edition.)

SMYTHE'S Law of Landlord and Tenant, in Ireland.

KENT'S COMMENTARIES. Vol. IV. Lect. 56.

BLACKSTONE'S COMMENTARIES. Book II. ch. 9.

FLINTOFF on Real Property. Vol. II. Book I. ch. 3.

DANE'S ABRIDGMENT, ch. 133.

BACON'S ABRIDGMENT. Tit. Leases and Terms for Years. This article is a Treatise, written by Ch. Baron Gilbert.

GIBBONS on Fixtures, in 13 Law Library.

[TAYLOR'S American Law of Landlord and Tenant, 2d edition.]

## CHAP. I.

## ORIGIN AND NATURE OF ESTATES FOR YEARS.

## CHAP. II.

## INCIDENTS TO ESTATES FOR YEARS.

## CHAP. I.

## ORIGIN AND NATURE OF ESTATES FOR YEARS.

- SECT. 1. *Estates less than Freehold.*  
 2. *Origin of Estates for Years.*  
 3. *Description of.*  
 9. *Introduction of long Terms.*  
 10. *Tenant for Years has no Seisin.*  
 12. *But must make an Entry.*  
 15. *An Entry before the Lease begins is a Disseisin.*

- SECT. 18. *Estates for Years may commence in futuro.*  
 19. *And be assigned before Entry.*  
 22. *May determine by Proviso.*  
 23. *Are Chattels Real.*  
 24. *And vest in Executors.*  
 34. *A Freehold cannot be derived from a Term.*

SECTION 1. Having treated of the different freehold estates, we now come to consider of those estates or interests in land

that are less than freehold; of which there are four sorts:—  
1. Estates for years. 2. Estates at will. 3. Tenancies from year to year. 4. Estates at sufferance.

2. It has been stated that, after the Conquest, the demesnes of the lords of manors were generally cultivated by their villeins to whom small portions of lands were allotted for their support and maintenance, to be held at the mere will of the lord. But as to those persons whose condition was free, it became customary to grant them lands for a certain number of years, to be held in consideration of a return of corn, hay, or other portion of their crops; by which they acquired a certain interest in their lands, though much inferior to an estate of freehold. Thus Bracton says,—*Poterit enim quis terram alicui concedere ad terminum annorum, et ille eandem, infra terminum illum, alteri dare.* And a tenant for years was called *Firmarius*. (a)

3. This estate is thus described by Littleton:—"Tenant for term of years is, where a man letteth lands or tenements to another for term of *certain* years, after the number of years that is accorded between the lessor and the lessee, and the lessee *entereth* by force of the lease; then is he tenant for years." And if an *agreement* be made for the *possession* of lands for half a year, or a quarter, or any less time, the lessee is considered as tenant for years,<sup>1</sup> and is so styled in all legal proceedings; a year being the shortest period of which the law will in this case take notice. (b)<sup>2</sup>

4. Where an estate is limited to a person for twenty-one years, if *J. S. shall so long live*, it is an estate *for years only*; not an estate for the life of J. S., because there is a fixed period, beyond which it cannot last. (c)

5. Where a person devises lands to his executors for payment of his debts, or *until his debts are paid*; the executors only take an estate for *so many years* as are necessary to raise the sum

(a) *Ante*, Dissert. c. 3. s. 52, 53. Bract. 27. a.

(b) Litt. s. 58, 67.

(c) 1 Inst. 45. b. (*Post*, § 34.)

<sup>1</sup> Because the whole usufruct is in him; but if the land is let on shares, for a single season, the possession is not changed. 4 Kent, Comm. 95.

<sup>2</sup> As to the manner of making leases, and the persons competent to make them, see *post*, Vol. IV. tit. 32, ch. 5.



required. (For if it were held an estate for their lives only, and they should die before the debts were paid, the creditors would have no remedy.) It is the same where an estate is devised till such time as a particular sum shall be raised out of the rents and profits thereof. (a)

6. Lord Coke says, an estate for years is frequently called a *term, terminus*, which signifies not only the period of time for which it is to continue, but also the estate and interest that passes for that period. And every estate or term for years must have a certain beginning, and a certain end, which must be ascertained at the time when the estate is created, either by the express limitation of the parties, or by a reference to some collateral act, which may, with equal certainty, measure its continuance. (b)

7. There is a *tenure* between the lessor and his lessee for years, to which fealty is incident; and also a *privity of estate* between them. (c)

\*8. Notwithstanding the permanent interest of tenants \*224 for years, yet their possession was esteemed of so little consequence that they were rather considered as the bailiffs or servants of the lord, than as having any estate in the land. Their interests might be defeated by a recovery in a real action; because the recoveror was supposed to come in by a title paramount, therefore not bound by the contracts of the prior possessor. This was altered by the Statute of Gloucester, 6 Edw. I., and the Statute 21 Hen. VIII., by which tenants for years are enabled to falsify recoveries had by collusion. (d)

9. While estates for years might be defeated by a recovery, it is no wonder that they were usually very short; and Lord Coke, upon the authority of the Mirror, says, that by the ancient law no lease was allowed for more than forty years; because a longer possession, especially when given without livery, declaring the nature and duration of the estate created, might tend to defeat the inheritance. But Sir W. Blackstone observes, that this law, if it ever existed, was soon antiquated; for, in Madox's collection of ancient charters, there are some leases

(a) 1 Inst. 42. a. 8 Rep. 96. a. Corbet's case, 4 Rep. 81. b. 1 P. Wms. 509, 518. 2 Vern. 403. 5 East, 162.

(b) 1 Inst. 45. b. (Evans v. Vaughan, 4 B. & C. 261.) Tit. 32. c. 5.

(c) Lit. s. 132. (d) Gilb. Ten. 34. 1 Inst. 46. a. Tit. 36. c. 11.

for years of an early date, which considerably exceed that period; and that terms for three hundred and a thousand years were certainly in use in the time of Edw. III., and probably in that of Edw. I. And it appears certain that after the statutes by which terms for years were protected from the operation of feigned recoveries, *long terms* were frequently created for the purpose of defrauding the lord's right of wardship, relief, and other feudal incidents. And in modern times, they have been still more extensively introduced in mortgages and family settlements. (a) <sup>1</sup>

10. A tenant for years is *not* said to be *seised* of the lands, the possession not being given to him by the ceremony of livery of seisin. Nor does the mere delivery of a lease for years vest any estate in the lessee, but only gives him a right of entry on the land; when he has actually entered, the estate becomes vested in him, and he is then *possessed*, not properly of the land, but *of the term for years*; the seisin of the freehold still remaining in the lessor. And it has been stated that the possession of a lessee for years is considered as the possession of a person entitled to the freehold. (b)

225 \*      \* 11. The distinction between the possession of a tenant for years, and the seisin of the freehold, was fully established in Bracton's time, who says, that if a person first creates a

(a) 1 Inst. 45. b. 2 Bl. Comm. 142. *Ante*, s. 8.

(b) Lit. s. 59. 1 Inst. 200. b. Tit. 1.

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<sup>1</sup> Leases for long terms, as, for example, 2000 years, are not regarded in England as leases, in the ordinary sense, but as terms to attend the inheritance. *Denn v. Barnard*, Cowp. 595, 597; 4 Kent, Comm. 86. But in the United States they are treated altogether as personal estate, and are administered accordingly, as other chattels. *Gay, ex parte*, 5 Mass. 419; *Montague v. Smith*, 13 Mass. 396; *Chapman v. Gray*, 15 Mass. 439; *Brewster v. Hill*, 1 N. Hamp. 350; 4 Kent, Comm. 93. In *Massachusetts*, however, lands held by lease for the term of one hundred years or more, have all the attributes of real estate, so long as fifty years of the term remain unexpired, so far as regards the devise and descent thereof, dower, sales by executors, administrators, and guardians, by license of Court, levying of executions thereon, and redemption, whether after levy or mortgage. Rev. Stat. 1836, ch. 60, § 18. In *Ohio*, permanent leaseholds, renewable forever, are in all respects deemed real estate. Rev. Stat. 1841, p. 289. In *Vermont*, lessees for years in possession, on a rent reserved certain, of whose term fifty years or more remain unexpired, are deemed freeholders, so far as regards qualification to hold office, to serve as jurors and appraisers, and to be received and justify as bail and sureties. Verm. Rev. Stat. 1839, p. 599. [A lease of lands for ninety-nine years, renewable forever, is a mere chattel interest. *Spangler v. Stanler*, 1 Md. Ch. Decis. 36.]

term of years, and afterwards enfeoffs another of the same tenement, with livery of seisin, both estates shall stand. *Quia bene sese compatiuntur de eadem re duæ possessiones, dum tamen ex diversis causis, sicut traditio ad firmam, et traditio in feodo.* (a)

12. No estate for years can be created by a lease, or other *common law conveyance*, without an *actual entry* made by the person to whom the land is granted; for, although the grantor has done every thing necessary on his part to complete the contract, so that he can never afterwards avoid it; yet till there is a transmutation of the possession, by the actual entry of the grantee, it wants the chief mark and indication of his consent, without which it might be unwarrantable to adjudge him in actual possession to all intents and purposes; and for this reason the law does not cast the immediate and actual possession on him till he enters; neither has the grantor a reversion to grant till such entry. (b)<sup>1</sup>

13. Upon the execution of a lease, the lessee acquires an interest, called an *interesse termini*, which he may at any time reduce into possession by an actual entry. This may be made not only by the lessee himself; but, in case of his death, by his executors or administrators. (c)<sup>2</sup>

14. It should, however, be observed that, in consequence of the operation of the *Statute of Uses*, an estate for years may now be created *without an entry*. (d)

[As where a freehold estate is conveyed to A. and his heirs, to the use of B for ninety-nine years, with remainder to the grantor in fee; in this case A. has only a momentary seisin to serve the use which is executed in B, and to which the statute instantly annexes the possession and legal estate, without B's actual entry.]

15. If the lessee *enters before the time* when the estate for

(a) Bract. lib. 2. c. 18. s. 7.

(b) 1 Inst. 46. b. 51. b. 270. a. Bac. Ab. Leases, M. (4 Kent, Comm. 97.)

(c) 1 Inst. 46. b.

(d) Tit. 11. c. 4. (4 Kent, Comm. 97.)

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[<sup>1</sup> Where demised premises are destroyed after the execution of the lease, and before the commencement of the term, and before the lessee has taken possession, the lessee is not liable for rent on the lease. *Wood v. Hubbell*, 5 Barb. Sup. Ct. 601.]

[<sup>2</sup> Under a joint lease to two tenants, the occupation of one is sufficient to make both liable for the rent. *Kendall v. Carland*, 5 Cush. 74.]

years is to commence, it is a *disseisin*; and no continuance of possession, after the commencement of the term, will purge it, or alter the estate of the lessee.<sup>1</sup> But such entry of the lessee, before the commencement of the term, will not divest or turn such term to a right; so that the lessee of the term may assign it over.

226.\*      \*16. A made a lease to B on the 23d of September, to hold to him for eighty-one years from Michaelmas following. The lessee entered before Michaelmas, and continued in possession for some years; then the lessor reëntered; the lessee being out of possession, assigned over the term to the plaintiff's lessor, who brought an ejectment. Judgment was given for the plaintiff; and the Court held, that the term not being to begin till Michaelmas, this was till then a future interest; that the lessee's entry before was a *disseisin*, not a possession by virtue of the lease. (a)

17. Where the commencement of an estate for years is limited from a time past, and the lessee was in possession prior to that period, it shall be intended that he entered and occupied before, by agreement; therefore it is not a *disseisin*. (b)

18. An *estate for years* may be created to *commence in futuro*, though an estate of freehold cannot; for where an estate for years is created to *commence in futuro*, the freehold is not thereby put in abeyance, but still continues in the lessor, so that he is capable of answering the *præcipes* of strangers which may be brought against him. And before the abolition of military tenures, he was liable to perform the services that were due for the feud. (c)

19. Where an estate for years is granted to commence *in futuro*, it cannot of course be executed by an immediate entry, as that would be a *disseisin*; it is, therefore, only an *interesse termini*; but still the *lessee may assign it over*; and even if a

(a) *Hennings v. Brabason*, 1 Lev. 45. *Bridg. Rep.* 1.

(b) *Waller v. Campian*, Cro. Eliz. 906. 9 Vin. Ab. 992.

(c) Tit. 1. s. 32.

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<sup>1</sup> But his possession is sufficient to maintain trespass against a mere stranger. Therefore, where A demised to B for one hundred years; and subject thereto, demised for two hundred years to C, who entered, but B did not; and afterwards D, a creditor of A, issued and executed an *elegit* upon the lands, which were accordingly delivered to him; it was held that C was entitled to the possession against D, and might maintain trespass against him. *Chatfield v. Parker*, 2 M. & R. 540; 8 B. & C. 543.

stranger enters by wrong, yet such grant will transfer the lessee's power of entry, and right of reducing the estate into possession. For till the entry of the lessee, the estate is not executed, but remains in the same plight as it was when the lease was made ; so that no intermediate act, either of the lessor, or of a stranger, can divest or disturb it ; because whoever comes to the possession, whether by right or by wrong, takes it subject to such future charge, which the lessee may execute whenever he thinks fit, as by a title prior and paramount to all such intermediate violations of the possession. (a)

20. A person made a lease for years, to commence at a future period ; after the expiration of that time, but before any entry by the lessee, the lessor being still in possession, the lessee granted \* over his term and interest. Resolved, that the \* 227 grant was good ; because the *interesse termini* of the lessee was not divested or turned to a right, but continued in him in the same manner as when it was first granted ; and was so transferred over to another, who by his entry might reduce it into possession whenever he pleased. (b)

21. If, however, a person entitled to an estate for years, to commence *in futuro*, once enters, and is put out of possession, he cannot afterwards grant over his term to a stranger ; for by his entry the estate for years was actually executed ; and, being after that defeated by the entry of a stranger, the lessee has only a right of entry left in him ; which the policy of the law will not suffer him to transfer over to a stranger, no more than a right of action ; lest such transfer should encourage maintenance. (c)

22. Though an estate of freehold cannot be made to cease by the direction of the parties, but must, except in the case of uses, be taken from the person in whom it is vested, by means somewhat similar to those by which it was given to him ; yet it is otherwise in the case of an estate for years ; as that *may be made to cease by a proviso* in the conveyance itself, upon the performance of any particular act. The practice in conveyancing has, therefore, long been, where terms for years are created, to

(a) (Hennings v. Brabason, 1 Lev. 45.) Bac. Ab. Leases, M.

(b) Wheeler v. Thoroughgood, Cro. Eliz. 127. 1 Leon. 118. Saffin's case, 5 Rep. 124. a. Tit. 35. c. 10. s. 45. 1 Inst. 46. b.

(c) Cro. Eliz. 15. 5 Rep. 124. a.

insert a proviso, that when the trusts of the term are satisfied, the term itself shall cease and determine. (a)<sup>1</sup>

23. Estates for years are considered in law as *chattels real*, being an interest in real property, of which they have one quality, immobility, which denominates them real; but want the other—namely, a sufficient legal indeterminate duration; the utmost period for which they can last being fixed and determined. (b) *Catalla dicuntur omnia bona mobilia, et immobilia, quæ nec feuda sunt nec libera tenementa.* (c)

24. In consequence of this principle, estates for years do not descend to the heir of the person who dies possessed of them; but *vest in his executors or administrators*, like any other chattel. And although lands are now frequently demised for five hundred or a thousand years, yet the succession continues the same.

228\*      \*25. If a lease for years be made to a bishop, parson, or other sole corporation, and his successors, yet it will go to the executors of the lessee; because a term for years being a chattel, the law allows none but the personal representatives to succeed thereto; nor can this mode of succession to a chattel be altered or controlled by any limitation of the party. The king, however, by his prerogative, may transmit a chattel to his successors. (d)

26. Estates for years pass from executor to executor *in infinitum*; but whenever the course of representation from executor to executor is interrupted by one administration, it then becomes necessary for the ordinary to commit administration afresh of the goods of the person who was last possessed of the term, in

(a) 1 Inst. 214. b.

(b) 1 Inst. 118. b.    2 Bl. Comm. 385.    Tit. 1. s. 14.      (c) Spelm. Gloss. voce *Catalla*.

(d) 1 Inst. 9. a. 90. a.

[<sup>1</sup> Where a dwelling-house was let for five years, with a proviso that either party, if dissatisfied, might terminate the lease, by giving the other party six months' previous notice, and fulfilling all the other requirements of the lease, until the expiration of the six months; and it was agreed in the lease that the lessee should pay the rent by boarding the lessor and his family twenty-seven weeks in each year, between the months of October and May: it was held, that the six months' notice by either party to terminate the lease, must be so given as to expire at the end of a year of the term. *Baker v. Adams*, 5 Cush. 99. Where a lease for years provides that in case the rent is not paid when due, the lessor may enter "without further notice or demand," and divest the lessee, no previous demand of rent is necessary to entitle the lessor to enter. *Fifty Associates v. Howland*, Ib. 214.]

his own right, not administered by the former executor. A limited or special administration only may also be granted,—namely, of certain specific effects; and it is a common practice to obtain a special administration of a term for years. (a)

27. Where there are several executors, who all prove the will, they have a joint and several interest in all the goods and chattels of the testator; therefore a disposition by one of them only of a term for years is good. But one administrator cannot convey an interest so as to bind the other. (b)

28. Where a person appoints two or more executors, if only one of them proves the will, he alone will become entitled to any terms for years whereof the testator died possessed, and may assign them accordingly. (c)

29. An executor may assign a term for years before he has proved the will; but the will must be afterwards proved in the Ecclesiastical Court having jurisdiction over the place where the lands lie, otherwise it will have no effect as to the term. (d)

30. Where a term for years is specifically devised, the assent of the executor is necessary. But if the legatee disposes of the term at any future period, the assent of the executor will be presumed. (e)

31. A purchaser of a term for years from an executor is not bound to see to the application of the purchase-money; even though the term be charged with the payment of a particular debt, or specifically bequeathed; because terms for years are subject to the payment of all debts, in the first instance. (f)

32. By the Statute of Frauds, 29 Cha. II. c. 3, s. 25, a husband \* may administer to his deceased wife; and is \* 229 entitled for his own benefit to all her chattels real, whether actually vested in her, and reduced into possession, or contingent, or recoverable only by action or suit. And it is now settled that the representative of the husband is entitled as much to this species of his wife's property, as to any other; and that the right of administration follows the right of the estate, and ought, in case of the husband's death, after the wife, to be granted to the next of kin of the husband. And if administration *de bonis non*

(a) 2 Bl. Comm. 506. 11 Vin. Ab. 107.

(c) Cases and Opinions, vol. 1. 399.

(e) Wentw. Ex. 226.

(b) Dyer, 23. b. 1 Ab. Eq. 319. 1 Atk. 460.

(d) Wentw. Ex. 34.

(f) Ewer v. Corbett, 2 P. Wms. 148.

of the wife is obtained by any third person, he is a trustee for the representatives of the husband. (a)

33. The *husband* of a woman possessed of a chattel real is also entitled to *dispose of it by assignment*, but not by will. If, however, he does not execute his power, and his wife survives him, it will belong to her. But if the husband be an alien, he will not acquire any right to a term of years belonging to his wife. (b)

34. An *estate of freehold cannot be derived from a term for years*. Thus, where a rent was granted for life, out of a long term for years, it was resolved to be a good charge as long as the term lasted; but that it was only a chattel, and not a freehold estate; for it was repugnant to have a freehold out of a term for years. (c)

35. Estates from year to year will be treated of in the next title.

(a) 1 Inst. 351. a. *Squib v. Wyn*, 1 P. Wms. 378.

(b) Anon. 9 Mod. 43. Id. 104. Tit. 5. c. 1. s. 27.

(c) Butt's case, 7 Rep. 23. a. 25. a. (*Saffery v. Ellgood*, 1 Ad. & El. 191.)



## CHAP. II.

## INCIDENTS TO ESTATES FOR YEARS.

SECT. 1. <i>Tenants for Years entitled to Estovers.</i>	SECT. 22. <i>But not Entailed.</i>
2. <i>But cannot commit Waste.</i>	26. <i>Merged by a Union with the Freehold.</i>
12. <i>Clause, without Impeachment of Waste.</i>	29. [ <i>But not before Entry of Termor, it being then an interesse Termini.</i> ]
16. <i>Accidents by Fire.</i>	32. <i>By Surrender.</i>
18. <i>When entitled to Emblements.</i>	40. <i>Terms merge in Terms.]</i>
19. <i>Estates for Years subject to Debts.</i>	44. <i>Equity relieves against Merger.</i>
20. <i>Alienable.</i>	47. <i>How forfeited.</i>
21. <i>May be limited for Life, with a Remainder over.</i>	

SECTION 1. Every tenant for years has incident to and inseparable from his estate, unless restrained by special agreement, the same *estovers* to which tenants for life are entitled. (*a*)

2. But a tenant for years having an interest much inferior to an estate for life, has only a right to the temporary and annual profits of the land; and is, therefore, restrained, as well as tenants for life, from cutting down timber trees, or committing any other kind of *waste*.<sup>1</sup> (*b*)

3. Tenant for years is also *punishable for permissive waste*;<sup>2</sup> and is, therefore, bound to keep all houses, and other buildings

(*a*) 1 Inst. 41. b. Tit. 3. c. 1. s. 16.

(*b*) Tit. 3. c. 2.

<sup>1</sup> For the American law of Waste, see *ante*, tit. 3, ch. 2. [See *Davis v. Alden*, 2 Gray, 309; *Kidd v. Dennison*, 6 Barb. Sup. Ct. 9.]

<sup>2</sup> At common law, the lessor for years was not bound to repair the building, without an agreement for that purpose; but the lessee, who had the use of it, was bound to repair, though he was not subject to an action at common law, for not repairing. Countess of Shrewsbury's case, 5 Co. 13, b. But by the Statute of Gloucester, 6 Ed. 1, c. 5, the lessor may have an action of waste, or upon the case in the nature of waste, against the lessee, if he *permits* the building to be out of repair, unless it was ruinous at the time of the lease; for that statute extends to permissive, as well as to voluntary waste. 1 Saund. 323 b, note (7,) by Williams; *Harnett v. Maitland*, 16 M. & W. 257. And see 2 Saund. 252 a, note (7); *Burdett v. Withers*, 7 Ad. & El. 136.

upon the land, in proper and tenantable repair, by preserving the roof in such a state as to prevent the rain from falling on the timbers. But if a house be ruinous at the time when the lease is made, and the lessee suffers it to fall down, he is not punishable, for in that case he is not bound to repair it; yet if  
 231 \* he cuts \* down timber on the land, and employs it in repairing the house, he may well justify. (a)

4. Lord Coke says,—if a tenant for years builds a new house, it is waste; and if he suffers it to be wasted, it is a new waste. The first of these propositions has been frequently contradicted. And Rolle lays it down, that if a lessee for years builds a new house upon the land, where there was not any before, it is not waste, being for the benefit of the lessor. (b)

5. The Statutes of Marlbridge and Gloucester, which have been already stated, extend to tenants for years; so that they are liable to the same actions, and the same penalties for waste committed, as tenants for life. (c)

6. If a woman possessed of a term for years takes a husband, who commits waste, and the wife dies, the husband shall be charged in an action of waste; because by the marriage he became entitled to the term. (d)

7. It is enacted by the Statute 11 Hen. VI. c. 5, that where a tenant for years assigns over his estate, and continues in the receipt of the profits, an action of waste shall lie against him. In a case upon this statute in 36 Eliz., it was resolved,—1. That every assignee of the first lessee, mediate or immediate, was within the act. For the statute was made to suppress fraud and deceit, therefore should be taken beneficially. 2. That the person in remainder was within the act, as well as the person in reversion; because in equal mischief. (e)

8. Where there is a tenant for years, remainder for life, remainder in fee, and the tenant for years commits waste; though the remainder-man for life cannot bring an action of waste, as not having the inheritance, yet he is entitled in equity to an injunction. If the waste be of a trivial nature, and *à fortiori* if it be meliorating waste, as by building on the premises, the Court will not enjoin; nor if the reversioner or remainder-man in

(a) Lit. s. 71. 1 Inst. 57. a. 54. b.      (b) 1 Inst. 53. a. 22 Vin. Ab. 439. Hob. 234.

(c) Tit. 3. c. 2. s. 26. *Attersol v. Stevens*, 1 Taunt. 183.      (d) 1 Inst. 54. b.

(e) Booth's case, 5 Rep. 77.

fee be not made a party, who possibly may approve of the waste. (a)

9. The Court of Chancery will not entertain a bill against a tenant for years after he has assigned his term, with the consent of the lessor, for an account of timber cut down by him, and without praying an injunction.

10. A bill was brought for an account of timber cut down by the defendant, and of the profit of some stones carried off the premises by him also, while tenant; he having afterwards \* assigned his term, with the consent of the plaintiffs, his \* 232 lessors, to a third person; and, consequently, no prayer for an injunction to stay waste. (b)

Lord Hardwicke. "The question is, whether a bill can be brought here against a tenant, after the estate is gone out of him, for an account of waste committed, where there is no prayer of an injunction. I am of opinion that such a bill is improper, nor has any authority been cited to support it. Waste is a tort, and punishable as such; and the party has also a remedy for the trees cut down, by an action of trover. The staying waste is a specific remedy; and while the lessee continues tenant, it is to prevent a mischief for which, when done, an adequate satisfaction by way of damages cannot, in many instances, be given. This is the ground of the jurisdiction of this Court in such cases; and the Court having such ground, will, in order to prevent a double suit, and as incident to the other relief, decree an account of the timber felled, or the waste done. This is a general principle to prevent suits; and as some decree must be made, the Court will make a complete one. But without such a foundation, there is no precedent of the Court's decreeing damages; and I think it would be very improper to do it, as it would tend to great vexation and oppression of tenants; and I am glad no such precedent is to be found, for the cases cited do not come up to the present. In 2 P. Wms. 240, it is not clear that no injunction was prayed. If there was, then it is but a common case; if there was not, then the plaintiff was entitled to a moiety of the timber against the defendant, and therefore proper matter of account only between them. As to 1 P. Wms. 406, the bill was against an

(a) *Mollineux v. Powell*, 3 P. Wms. 267. Tit. 3. c. 2. s. 34.

(b) *Jesus Coll. v. Bloom*, 2 Atk. 262.

executor for an account of assets; and in a case of a mine, which differs from timber or other waste, it being a sort of trade, and proper for an account, not trover; and the Court has decreed accounts in cases of mines, which they would not do in any other for that very reason; and because a better remedy can be given here than at law, by decreeing inspections under ground, &c. And here, if the plaintiffs have a right, they may have their action of trover." (a)

11. If a lessee for years commits waste and dies, no action of waste will lie against his executors or administrators. But the executors or administrators of a tenant for years are punishable for waste done while they are in possession. (b)

233\*      \*12. Where the clause, *without impeachment of waste*, is inserted in a lease for years, it will have the same effect as where it is inserted in the conveyance of an estate for life. And the Court of Chancery will in general restrain the import of it, in the same manner. Thus a tenant for years, though without impeachment of waste, will not be allowed to dig, and carry away the soil for the purpose of making bricks. (c)

13. The Bishop of London made a long lease of some lands at Ealing, in Middlesex, without impeachment of waste; of which there were about twenty years unexpired. The lessee agreed with some brick-makers, that they might dig and carry away the soil. The bishop applied to the Court of Chancery for an injunction, which was granted. (d)

14. The Court of Chancery will not permit a tenant for years, though without impeachment of waste, to fell timber just before the expiration of the lease.

15. A lease was made by a bishop for twenty-one years, without impeachment of waste, of lands upon which there were several timber trees. The tenant had not cut down any of them, till about half a year before the expiration of his term; but then began to fell them. Upon an application to the Court of Chancery, an injunction was granted against him. For although he might have felled trees every year, from the beginning of the term, and then they would have been growing up gradually; yet

(a) *Whitfield v. Bewit*, 2 P. Wms. 240. Tit. 3. c. 2. s. 17.

(b) 2 Inst. 302.

(c) Tit. 3. c. 2.

(d) *Ep. London v. Webb*, 1 P. Wms. 527.

it was unreasonable that he should let them grow till near the end of his term, and then cut them all down. † (a)

16. Tenants for years are exempted by the Stat. 6 Ann., which has been already stated, from all actions for damages on account of *accidental fire*. (b)

17. In a modern case, where there was a *covenant* in a lease for years of a house, *to rebuild*, without any exception; and the house was burnt down by accident; it was held that the lessee was bound to rebuild it;<sup>1</sup> [so where the covenant is to repair.] (c)

(a) *Abraham v. Bubb*, 2 Freem. 63.

(b) Tit. 3. c. 2. Com. Rep. 629.

(c) *Bullock v. Dommitt*, 6 Term R. 650. *Pym v. Blackburn*, 3 Ves. 34.

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[† Upon the subject of waste as between landlord and tenant, see the cases collected in Comyn's Landlord and Tenant, Book 2, ch. 1, s. 2.]

<sup>1</sup> If the lessor is not bound by covenant to repair, the lessee must still perform his covenant to pay rent, though the house be destroyed by fire. *Fowler v. Bott*, 6 Mass. 63; *Lamott v. Sterrett*, 1 Har. & J. 42; *Wagner v. White*, 4 H. & J. 564; *Redding v. Hall*, 1 Bibb. 536. And if the tenant has covenanted to deliver up the house in good repair, at the expiration of the lease, he is bound to rebuild the house, if burned down. *Phillips v. Stevens*, 16 Mass. 238; *Pasteur v. Jones*, Cam. & Norw. 194. [If the lessee covenants to deliver up premises in as good order as at the date of the lease, ordinary wear and tear excepted, and there is no covenant to repair or rebuild, he is not bound to rebuild if the buildings are destroyed by fire. *Warner v. Hutchins*, 5 Barb. Sup. Ct. 666.] Under such covenants, the tenant is not justified in keeping the premises in bad repair because he found them in that condition; but he is still bound by the terms of his contract. *Payne v. Haine*, 16 M. & W. 541. But the state and age of the building are to be considered, in ascertaining the nature and reasonable extent of the tenant's obligation. *Stanley v. Towgood*, 3 Bing. N. C. 4; *Burdett v. Withers*, 7 Ad. & El. 136. He is not liable in *covenant* for acts done by him before the time of the execution of the lease; though the habendum states that he is to hold from a day prior to its execution, and prior to the acts done; the lessor's remedy, if any, being in some other form of action. *Shaw v. Kay*, 1 Exch. R. 412. But if the house were destroyed or the tenant dispossessed by a public enemy, this has been held to excuse the tenant from performance of the covenant. *Pollard v. Shaffer*, 1 Dal. 210; *Bayly v. Lawrence*, 1 Bay, 499. [As between the landlord and tenant of premises let from year to year, there is no obligation on the landlord to do substantial repairs in the absence of express stipulations to that effect. *Gott v. Gaudy*, 22 Eng. Law & Eq. 173. Under a covenant in a lease, to deliver up the premises in as good order and condition as when received, reasonable use, &c., fire and other casualties excepted, the tenant is bound to make whatever repairs are necessary to keep the premises in such condition. *Jaques v. Gould*, 4 Cush. 384. A clause in a lease that "the owner shall not be liable for any repairs on the premises during the term, the same now being in perfect order," has respect only to the condition of the house as an edifice in perfect repair and not to the present or future purity of the air within it. *Foster v. Peyser*, 9 Cush. 242. In a sealed lease of a house for a private residence, there is no implied covenant that it is reason-

18. Where the *determination* of an estate for years is *certain*, as where lands are let for twenty-one years, or any other number, the tenant is *not entitled to emblements*; because it was his own folly to sow, when he knew he could not reap.<sup>1</sup> But when

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bly fit for habitation. *Ib.* Nor in a general lease of a store or warehouse, is there any implied warranty that the building is safe, well built, or fit for any particular use. *Dutton v. Gerrish*, *Ib.* 89. It is implied from the hiring of a farm for agricultural purposes, that the tenant will cultivate the land according to the rules of good husbandry. *Lewis v. Jones*, 17 Penn. State R. (5 Harris) 262. When a house, which was built for a hotel, was leased without stipulation as to the employments that should be carried on in it, the lessee may use it for a seminary, or may underlet it for that purpose. *Nave v. Berry*, 22 Ala. 382. Under a parol demise the law will imply an agreement for quiet enjoyment, but not for good title. *Bandy v. Cartwright*, 20 Eng. Law & Eq. 374. See *Noyes v. Anderson*, 1 Duer (N. Y.) 342.

A lessee, who, in appealing from the judgment of a lower court, giving possession of the premises to the lessor, recognizes in pursuance of a statute, "to pay all intervening rent, and all damages and loss which the lessor may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any damages done to the premises by reason of such withholding, is liable *primâ facie*, and in ordinary cases, to pay rent at the rate reserved in the lease until the recovery of possession by the lessor, although the buildings on the premises be meanwhile destroyed by fire; and is responsible for all waste, actual and permissive, and for all losses including the destruction of the building, if not proved by him to have been caused by inevitable accident. *Davis v. Alden*, 2 Gray, 309.

By the common law the occupier and not the landlord is bound as between himself and the public, so far to keep buildings in repair, that they may be safe to the public; and such occupier is *primâ facie* liable to third persons for damages arising from any defect. But if there is an express agreement between the landlord and tenant, that the former shall keep the premises in repair, so that if there were a recovery against the tenant, he would have his remedy over, then to avoid circuitry, the party injured in the first instance may have his action against the landlord. *Lowell v. Spaulding*, 4 Cush. 277; *New York v. Corlies*, 2 Sandf. Sup. Ct. 301; *Bellows v. Sackett*, 15 Barb. Sup. Ct. 96.]

<sup>1</sup> *Whitmarsh v. Cutting*, 10 Johns. 360; *Bain v. Clark*, *Ibid.* 424; *Harris v. Carson*, 7 Leigh, 632. Where a farm is let for a year *upon shares*, the lessor and lessee are tenants in common of the crops. *Caswell v. Districh*, 15 Wend. 379; *Walker v. Fitts*, 24 Pick. 191. [The lessee of a farm under a lease, stipulating that one half of the hay shall be consumed on the farm, and the other half divided equally between the lessor and the lessee, has the entire property in the hay, until division. The division vests the portions of the divided half in the lessor and lessee respectively, but the undivided half to be consumed on the farm, remains the property of the lessee. *Symonds v. Hall*, 37 Maine (2 Heath) 354; see also *Munsell v. Carew*, 1 Cush. 50; *Moulton v. Robinson*, 7 Foster, N. H. 550; *Ross v. Swearingen*, 9 Ire. 481; *Lathrop v. Rogers*, 1 Carter (Ind.) 554. A lease of a farm and sheep contained this clause: "The wool now growing on the sheep, and the lambs, if any which the sheep may have, I shall claim to remain my property, until the worth of it and them is paid me toward the use of the place." Within the year, no rent being paid, the wool and lambs were attached as the property of the lessee. Held, that the property in the wool and lambs remained

the determination of an estate for years depends on an \**uncertain event*; as where a tenant for life lets the lands \*234 for years, or where a term of years is made determinable on the death of a particular person; there the tenant will be *entitled to emblements*; in the same manner as a tenant for life.<sup>1</sup> If, however, an estate for years determines by the voluntary act of the tenant himself, as if he commits a forfeiture, he will not be entitled to emblements. (a)<sup>2</sup>

(a) Tit. 2. c. 1. 1 Inst. 55. b. Davies v. Connop, 1 Price, 53. 16 East, 71. (Bulwer v. Bulwer, 2 B. & Ald. 470.) Oland v. Burdwick, Cro. Eliz. 460. (Debow v. Colfax, 5 Halst. 128.)

in the lessor until the payment of the rent. Whitcomb v. Tower, 12 Met. 487.] And in *Ohio* it is held that the landlord has a lien on the crop for his share, and that no part can be removed by the tenant, until the landlord's share is set off. Case v. Hart, 11 Ohio R. 364. [See 10 Ired. (N. C.) 63; 11 Ib. 12.]

<sup>1</sup> Where land was let for a term of years, determinable by either party on six months' notice to the other, the lessor agreeing that if he determined the tenancy, he would allow compensation to the tenant for preparing and sowing the ground; and he did so determine it, after the ground was sowed; it was held that the tenant was entitled to the emblements. Stewart v. Doughty, 9 Johns. 108.

<sup>2</sup> It is not necessary that the whole act of forfeiture be the immediate act of the tenant, provided all the subsequent proceedings resulted from his act. Thus, where land was let, on condition that if the lessee should incur any debt upon which judgment should be entered up, and execution should issue thereon, the lessor might reënter, and possess the land as of his former estate; and the condition was broken, and the lessor entered accordingly; it was held that the lessor was entitled to the emblements. Davis v. Eyton, 7 Bing. 154. But though, in such cases, the tenant himself justly forfeits the emblements, the lease being terminated by his own fault, yet this consequence is not visited upon his under-tenant, who had no participation in destroying the estate. Therefore, where a tenant of a term of years, defeasible on condition subsequent, made an under-lease, and his lessee sowed the land, after which the first tenant broke the condition, and the landlord thereupon entered for the breach, it was held that the under-tenant was entitled to the emblements. Oland v. Burdwick, Cro. El. 46; Bevans v. Briscoe, 4 Har. & Johns. 139. And see Doe v. Witherwick, 3 Bing. 11. This doctrine, however, is not applied to the case of foreclosure of a mortgage; for in such case it has been held that the mortgagee, or purchaser, and not the lessee of the mortgagor, is entitled to the crops growing on the premises at the time of the foreclosure and sale. Lane v. King, 8 Wend. 584. [The right to emblements does not attach until the seed is sown; preparing the land to receive it is not sufficient. Price v. Pickett, 21 Ala. 741.]

Property in the growing crop may also be created by contract; as, if the lessor should covenant that the lessee shall take and carry away to his own use the corn that shall be growing on the premises at the end of the year; and the lessor should afterwards grant the reversion to a stranger, yet the property in the corn was by the covenant well transferred to the lessee, and he may take it away, though it be not severed during the term. Grantham v. Hawley, Hob. 132; [Briggs v. Oaks, 26 Vt. 3 Deane, 138; Harrower v. Heath, 19 Barb. Sup. Ct. 331.]

19. Estates for years being chattel interests, and vesting in executors or administrators, are *subject to the payment of simple contract debts*; and are also liable to be sold by execution for the

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On this principle the rights of parties are adjusted in regard to what is termed the away-going crop,—that is, the crop which was sown during the term, but is not ripened for gathering until the term has expired. If it is expressly covenanted that the tenant shall have it, he may take it away after the term has expired; or, it may be taken and sold on process, for his debts. *Deaver v. Rice*, 4 Dev. & Batt. 431; and see *Austin v. Sawyer*, 9 Cowen, 39. The right thus reserved is considered as a prolongation of the term, as to the land on which the crop grows, and so far the possession of the land remains in the tenant until the crop is taken. *Boraston v. Green*, 16 East, 81. And though where the lease is express, the terms of the contract must govern, even against any custom or usage to the contrary; yet where the lease is silent, the custom of the country is admissible in evidence to determine the rights of the tenant as to the away-going crop, as well as to other particulars. *Wigglesworth v. Dallison*, 1 Doug. 201; *Webb v. Plummer*, 2 B. & Ald. 746; *Hutton v. Warren*, 1 M. & W. 466; *Holding v. Pigott*, 7 Bing. 465; 5 M. & P. 427; *Beavan v. Delahay*, 1 H. Bl. 5; *Stultz v. Dickey*, 5 Binn. 285; *Biggs v. Brown*, 2 S. & R. 14; *Demi v. Bossler*, 1 Pennsylv. R. 224; *Van Doran v. Everitt*, 2 South. 460; *Templeman v. Biddle*, 1 Harringt. 522; *Craig v. Dale*, 1 Watts & Serg. 509; *Van Ness v. Packard*, 2 Peters, 138; *Wilcox v. Wood*, 9 Wend. 349. The right of the outgoing tenant to remove the manure, made on the farm during his tenancy, depends on express stipulation, or on the settled and uniform custom of the country. In the absence of any such contract or custom, the law of good husbandry requires that it be used on the farm, and, therefore, he cannot remove it. *Lassell v. Reed*, 6 Greenl. 222; *Middlebrook v. Corwin*, 15 Wend. 169; *Watson v. Welch*, 1 Esp. 131; *Brown v. Crump*, 1 Marsh. 567; *Powley v. Walker*, 5 T. R. 573; and see *Rinnehart v. Olwine*, 5 Watts & Serg. 163; [*Lewis v. Jones*, 17 Penn. State R. (5 Harris.) 262;] *Roberts v. Barker*, 1 Cr. & M. 808; 3 Tyrw. 945, S. C.; [see *Needham v. Allison*, 4 Foster, (N. H.) 355.] And in regard to the custom, it is only where the contract is silent, or its meaning is doubtful, that evidence of the custom is admissible; and in order to be admitted, the custom must be proved to be certain and uniform, and known to the parties, or to be so general and well established that the knowledge and adoption of it by the parties may well be presumed. *Macomber v. Parker*, 13 Pick. 176; *Stevens v. Reeves*, 9 Pick. 198; *Collings v. Hope*, 3 Wash. 149; *Wood v. Hickock*, 2 Wend. 501.

And generally, in regard to those things which a tenant may remove from the premises, after having himself affixed them, it may here be observed, that it is not necessarily to be inferred from the annexation that the chattel annexed has become the property of the freeholder or landlord; but whether it has become so, or not, may be a question upon the evidence; and the jury may, from the *user* and other circumstances, infer an agreement, made when the chattel was annexed, that the original owner should have liberty to take it away. *Wood v. Hewett*, 8 Ad. & El. 913, N. S.; *Gibbons on Fixtures*, [*Doak v. Wiswell*, 38 Maine, (3 Heath.) 569; *King v. Wilcomb*, 7 Barb. Sup. Ct. 263; *Dubois v. Kelly*, 10 Ib. 496; *Lawrence v. Kemp*, 1 Duer, N. Y. 363; *Teaff v. Hewitt*, 1 Ohio State R. 511; *Mason v. Fenn*, 13 Ill. 529; *Granger v. Michigan Canal*, Ib. 745; *Finney v. Watkins*, 13 Mis. 291; *Regina v. Haslam*, 6 Eng. Law & Eq. Rep. 221; *Ruffey v. Henderson*, 8 Ib. 305; *Wiltshear v. Cottrell*, 18 Ib. 142; *Elliott v. Bishop*, 28 Ib. 484; *Bishop v. Elliott*, 30 Ib. 595.]



payment of debts due by judgment. But if a term for years be assigned to a *bonâ fide* purchaser, without notice, before execution is actually sued out and delivered to the sheriff, it cannot afterwards be taken by a creditor. (a)

20. [A lessee may part with his whole term, unless restrained \* by a particular agreement;¹ so he may lease a \*235 part of it; in the former case it will be an *assignment*, in the latter an *underlease*.² And although a lessee cannot limit his term by way of remainder in the proper sense of that word, yet by assigning it to a trustee upon trusts, or by executory bequest, interests in the nature of remainders may be created by deed or will.] (b)

21. By the old law, a gift of a term for years like that of any other chattel, for an hour, was a gift of the whole estate and interest; therefore there could be no subsequent limitation of a term for years, after an estate was carved out of it. But this was soon altered; and it has been long settled that a term for years *may be limited to a person for life*, with a *limitation over* to any number of persons *in esse for life*; [and it may also be limited to a person not *in esse*, or not ascertained, provided such limitation take effect, if at all, within a life or lives in being, or twenty-one years after.] (c)

22. Terms for years, *cannot, however, be entailed*. 1. Because they are not within the Statute *De Donis*, being estates of inheritance. 2. Because if a *quasi* entail of a term for years were allowed, it would be unalienable, as no fine or recovery could be had of a term; so that the disposition of a term for years to a person and the heirs of his body, is a disposition of the entire interest in the term. (d)

23. A distinction has been made by Lord Coke between a

(a) Tit. 14. s. 67.

(b) 1 Burr. 284.

(c) Dyer, 74, 18. Tit. 38. c. 19.

(d) Dyer, 7. a. 8. Tit. 2. c. 1. s. 24. 4 Mad. 361. 19 Ves. 73. See *Howard v. Duke of Norfolk*, 2 Swanst. 454.

¹ If the agreement is that he shall not assign or alienate his *estate*, or *term*, or the *premises*, an alienation or underlease of part is no breach. *Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Harrison*, 17 Johns. 66; see *post*, tit. 13, ch. 1, § 42.

² If a lessee underlets a part of the demised premises, and the sub-tenant is recognized as such, and the rent is demanded of him by the lessor, the lessee and sub-tenant are not jointly liable to the lessor for the mesne profits of the whole premises. *Fifty Associates v. Howland*, 5 Cush. 214.]

limitation of a term in gross, or subsisting term, to a man and the heirs of his body, and a similar limitation of a term *de novo*. In the first case the residue of the term will vest in the executors of the person to whom it is so limited. But in the latter case he was of opinion that the term would only continue as long as the person to whom it was limited had heirs of his body, and that upon failure of such heirs the term would cease. This distinction has been long since exploded; and it is now settled, that where a term for years is limited to a person and the heirs of his body, it will continue, though the person to whom it is so limited should die without issue. (*a*)

24. A. Pile, by indenture, demised lands to a trustee, his executors, and administrators, for ninety-nine years, in trust for himself and his wife for their lives, and the life of the survivor; and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue, then in trust for 236\* the heirs \*of the survivor. They had issue one son.

The husband died; afterwards the son died, an infant; the mother administered to her husband and son, and assigned the term to the defendant Rod. The question was, who was entitled to the trust of this term? whether it belonged to the plaintiff, who was the heir at law of A. Pile, or to the defendant Rod, as assignee of the wife? It was decreed that it belonged to Rod, and had not ceased. (*b*)

25. [Although chattels real and other personal estate cannot be entailed, for the reasons above stated, yet *through the medium of trusts*, and by executory devise, they *may be limited*, so as in a great measure to answer the purposes of entail, and indeed are susceptible of modification, so as to be confined in a particular course of devolution, and, except for the purposes of accumulation, rendered unalienable for any number of lives in being, and twenty-one years after, with a further period allowed for gestation; at the end of which period the personalty will vest absolutely in the person taking under the limitation trust or executory bequest.] †

(*a*) 8 Rep. 87. *u. Leventhorpe v. Ashby*, 1 Roll. Ab. 881. *Leonard Lovie's case*, 13 Rep. 78.

(*b*) *Hayter v. Rod*, 1 P. Wms. 360.

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[† For instances of bequests of personalty, which in devises of real estates would give express or implied estates tail, see Vol. II. *Rop. Legacies*, ch. 22, sect. 1 & 2. Edition 1828, by the Editor of the present work.]

26. Where a term for years becomes vested in the person who is seised of the freehold, by which there is a union of the two interests in one person at the same time, [and there is no intervening estate between the term and the freehold,] the term merges in the freehold, and becomes extinct. (a) <sup>1</sup>

27. Tenant *pour autre vie* made a lease for years, and died, living the *cestui que vie*; it was agreed that by this the lessee for years, having the possession, became occupant; and the accession of the freehold merged in his estate for years. But if in that case the lessee for years had made a lease at will, and then the tenant *pour autre vie* had died, the tenant at will would have been the occupant; consequently the term for years, being in another person, would not be merged; there being no union of the term and the freehold in one person. (b)

28. A, seised in fee, demised to B for one hundred years, to begin at a future time; and before that time [granted the reversion in fee to C, who demised the land to D,] for twenty-one years, to begin presently. B, before the commencement of his \* term, assigned it to A, who afterwards granted a \*237 rent-charge, for which the grantee distrained D. The question was, whether the future term [of one hundred years] was drowned in the inheritance, or if it had any existence in A, so that he might thereout grant the rent; for then it would [have preference over] the second lease, being prior to it, and by consequence be liable to the payment of the rent-charge. It was resolved that the first term was [drowned in the inheritance.] (c)

29. [The language of the report in the above case is applicable to merger; but it must be understood as referring only to *extinguishment*; because the term of one hundred years in B was only an *interesse termini*; and though, as such, it might by release to the reversioner be *extinguished*, still, not being an actual estate, could not properly be said to *merge*. From this case, it appears, that an actual term intervening between an *interesse termini* and the reversion, will not prevent the extinguishment by release of the *interesse termini*, although, had the latter been an actual estate, it would have been prevented by the

(a) Dyer, 112, 49. (Roberts v. Jackson, 1 Wend. 478.)

(b) Chamberlain v. Ewer, Bulst. 12.

(c) Salmon v. Swann, Cro. Jac. 619. 3 Prest. Conv. 122.

<sup>1</sup> See *post*, Vol. VI. tit. 39, where the subject of Merger is more fully treated.

intervening term. Neither will the *interesse termini* intervening between a prior term and the reversion, prevent the merger of the term in the reversion, when they unite in the same person in the same right. (a)

30. Thus in the case of *Doe v. Walker*, A granted a lease to B for twenty-one years, which would expire at Michaelmas, 1809; in December, 1799, A granted a further lease to B of the same premises, for sixty years, to commence from Michaelmas, 1809; A died in December, 1800, and devised the reversion to B for life. In 1806, B conveyed his life-estate to C. It was decided by Bayley, J., that the *interesse termini* of the lease of 1799, which was to commence in 1809, was not merged in B's life-estate. (b)

31. It would seem from the preceding case, that an *interesse termini*, to commence *in futuro*, and which consequently does not give an immediate right to the possession, is not discharged or extinguished, by the mere accession of the freehold, devised to the person entitled to the *interesse termini*, so long as it gives only a future right of possession.

32. Merger of estates for years may take place in consequence of a *surrender* of them to the person in remainder, or reversion; but a term cannot be merged by surrender, till the tenant 238 \* has \* entered; for before entry, it is an *interesse termini* only, and there is no reversion in which it can merge.<sup>1</sup> If, however, the lessee for years enters, and after assigns his estate to another, the assignee may merge the term by surrender, before entry; because, by the entry of the lessee, the possession was severed and divided from the reversion. (c)

33. Lord Coke lays it down as a general rule, that a man cannot have a term for years in his own right, and a freehold in *autre droit*, to consist together. As if a man, lessee for years, takes a feme lessor to wife, the term is merged. But this proposition has been denied, for in *Lichden v. Winsmore*, 21 Jac. I., it was held that if a person was lessee for years, the reversion for life to A, a feme covert, and the lessee granted his estate to the husband; and after the feme died, the term was not extinct,

(a) 5 Bar. &amp; Cress. 122.

(b) 5 Bar. &amp; Cress. 111.

(c) 1 Inst. 338. u. 4 Bac. Ab. 216. Tit. 82. c. 7.

<sup>1</sup> But an *interesse termini* may be released. *Salmon v. Swann*, Cro. Jac. 619.

because the husband had the estates in several rights, for the freehold was in the wife, and the husband only seised in her right.] (a)

34. Lord Coke lays it down, that a man may have a freehold in his own right and a term in *autre droit*. Therefore, if a man lessor takes the feme lessee to wife, the term is not drowned; but he is possessed of it in her right, during the coverture. The reason of this doctrine is thus given by Gilbert:—"The term being existing in the feme till the intermarriage, is not thereby so drawn out of her, or annexed to the freehold, as to merge therein; because that attraction, which is only by act of law, consequent upon the marriage, would, by merging the term, do wrong to a feme covert; and so take the term out of her, though her husband did no express act to that purpose; which the law will not allow." (b)

35. [It is correctly stated by Mr. Preston, in his valuable Treatise on Merger, that the true distinction established by the cases is not generally that there will not be any merger, because the two estates are held in different rights, or because the freehold is held by the owner of the term in his own right, and the term in *autre droit*. The leading distinctions stated by him on the law of merger, as connected with the subject of the present title, are in a great measure comprehended in the propositions contained in the four following sections:—

\* 36. When estates meet in the same person, either by \* 239 act of law, or by act of the party, and he holds both in *his own right*, merger takes place; as where the reversion in fee descends upon, or is purchased by, the lessee—for *nemo potest esse dominus et tenens*. (c) It should seem, however, that this proposition must be taken with the following qualification:—That when several estates meet, in the same person, and are held in different rights, merger will not take place, unless the *power of alienation* of the person, in whom they meet, extends to *both* estates. (d)

37. When estates, held in different rights, meet in the same

(a) 1 Inst. 332. b. 11 Vin. Ab. 441. 1 Roll. Ab. 934. And see *Platt v. Sleaf*, Cro. Jac. 275. *Thorn v. Newman*, 3 Swan. 603, appendix. Vid. tit. 39, Merger, *infra*, vol. 6.

(b) 1 Inst. 333. b. Bac. Ab. tit. Leases, R.

(c) *Lee's case*, 3 Leon. 110. *Chamberlain v. Ewer*, 2 Bulst. 12. *Doe v. Walker*, 5 Barn. & C. 3.

(d) *Lichden v. Windsmore*, 2 Roll. Rep. 472.

person, *by act of the party, merger will take place*; <sup>1</sup> as where the husband, holding the term in right of his wife, purchases the reversion; or where an executor has a term in right of his testator, and purchases the reversion; but in the latter case the term, though merged, continues assets. (a)

38. When estates, held in different rights, meet in the same person, *by operation of law, merger does not take place*; as in the case of marriage, where a woman, being a termor, marries the reversioner, the term does not merge, because it devolves upon the husband by act of law. Again, in the instance of descent, where the husband termor marries, and afterwards the reversion descends upon his wife. So with respect to curtesy, when lessee for sixty years marries the reversioner, who afterwards dies before the expiration of the term, the term will continue during the wife's life, while the husband is seised in her right; and it should seem also, after her death, while he is tenant by the curtesy; although a doubt has been intimated as to the latter point. Again, in the case of executor or administrator, where lessor has the freehold in his own right, and the term devolves upon him as executor or administrator of the lessee. (b)

39. The application of this last doctrine between husband and wife, when the husband is seised of an estate of freehold in right of his wife, is obvious. Upon this subject, the author before mentioned makes the following observation:—"That the estate of freehold of the wife cannot merge, is a consequence flowing from an absence of a right in the husband to alien that estate.

(a) Moo. 171. 4 Leon. 38. 1 Roll. Abr. 934. pl. 9. Bro. Abr. tit. Executor, pl. 174. Extinguishment, pl. 57. 1 L. Raym. 520.

(b) 2 Roll. R. 472. 1 Inst. 338. b. Bac. Abr. tit. Leases, R. Platt v. Sleaf, Cro. Jac. 275. 1 Bulst. 118. Godb. 2. 1 Inst. 338. a.

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<sup>1</sup> In regard to estates acquired by act of the party, the rule, as generally understood in the United States, seems to be this, that they merge or not, and mortgages are extinguished or not, according to the *intent of the party*, as collected either from the deeds or from the circumstances of the transaction. And where these furnish no evidence of the intent, it may be inferred from his interest, which, in the absence of indications to the contrary, it may be presumed he intended to consult. Gibson v. Crehore, 3 Pick. 475; Eaton v. Simonds, 14 Pick. 98, 104; Freeman v. Paul, 3 Greenl. 260; Hunt v. Hunt, 14 Pick. 374; Freeman v. McGaw, 15 Pick. 82; Richards v. Ayres, 1 Watts & Serg. 485; Moore v. Harrisburg Bank, 8 Watts, 138; Lockwood v. Sturdevant, 6 Conn. 373. And see Forbes v. Moffatt, 18 Ves. 384; 4 Kent, Comm. 101. In either case the rights of creditors will be protected. Ibid. See farther on this subject, *post*, Vol. VI. tit. 39, MERGER.

It is a general rule, that the husband cannot, in virtue of his marital right, dispose of his wife's freehold, so as to preclude her \*from resuming her estate on his death. It \*240 would be absurd, then, in the law to suffer the husband to defeat the wife of her estate by indirect means, when it denies to him the privilege of doing it by alienation in express terms." (a)

40. It was for some time doubtful, whether one estate for years would *merge in another estate in reversion* of the same denomination. The cases are ably discussed in Mr. Preston's work, wherein he considers the proposition established in the affirmative. The point is now settled accordingly by the following recent decision. (b)

41. A mortgage term of 1000 years was created in 1720, and another for 500 years on the same premises in 1725. The term of 1000 years vested in A, subject to the debt charged thereon, and upon her death devolved upon her executors, who, in 1780, took an assignment of the 500 years' term, with the debt due thereon. In 1785, the executors assigned both terms to trustees on the marriage of the legatee, entitled to them under A's will. Sir John Leach, V. C., held that the 1000 years' term merged in the reversionary term for 500 years. (c)

42. It may be here remarked, that the less estate must always merge in the greater, that is *greater in quality*; and, with reference to the subject of the present title, it must be remembered, that the term is *not*, for the purposes of merger, considered greater, according to the extent of its possible *duration* or numerical quantity, *but* from its being the term *in reversion*; this is proved by the preceding case.]

43. The Statute of Uses expressly saves the rights of the feoffees to uses; which preserves from merger any terms for years that may be vested in persons to whom the lands are conveyed to uses. (d)

44. A Court of Equity will, in some cases, *relieve against the merger* of a term, and make it answer the purposes for which it was created.

45. A portion was directed to be raised out of a term for years, for a daughter. The fee afterwards descended on the

(a) *Stephens v. Brittridge*, 1 Lev. 86. Prest. Conv. 3d vol. 293, 297.

(b) Prest. Conv. vol. 3. 182, 207. Tit. 32. c. 7.

(c) *Stephens v. Bridges*, 6 Mad. 66.

(d) *Vide infra*, tit. 39. s. 94.

daughter, who, being under age, devised the portion. The Court relieved against the merger of the term, and decreed the portion to go according to the will of the daughter. (a) †

241 \* 46. A person having a term of 1000 years, assigned it to the owner of the inheritance, in trust for his wife and children; the assignee accepted the trust, and declared the purposes of it. The Court of Chancery supported the trust, notwithstanding the merger of the term; and decreed the heir of the lessor to make a further assurance of the residue of the term to a purchaser. (b)

47. If, however, a tenant for years attempts to create a *greater interest* than he lawfully can, *whereby the estate in remainder or reversion is divested*, it will operate as a *forfeiture* of his estate.<sup>1</sup> And Lord Coke says, if tenant for life or years, the remainder or reversion in the king, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the king. For the reason of the forfeiture is, in respect to the solemnity of the feoffment with livery, tending to the king's disherison. (c)

48. But where a tenant for years makes a *lease for a longer term* than he has, it is *no disseisin, nor forfeiture*; because it is only a contract between him and his lessee, which does not operate on the interests of the lessor. (d)

49. If a husband possessed of a term for years, in right of his wife, forfeits it, this shall bind the wife, because he might have disposed of it at his pleasure. (e)

50. An estate for years is not forfeited, if the person in remainder or reversion is a party to the conveyance; for in that case each person transfers only what he may lawfully alien. (f)

(a) *Powell v. Morgan*, 2 Vern. 90. *Thomas v. Kemeys*, 2 Vern. 348. Tit. 1. s. 50.

(b) *Saunders v. Bournford*, Finch, 424. 3 Swan, 603, 608.

(c) 1 Inst. 251. b. *Dyer*, 362. b. *Cro. Eliz.* 323. (d) 1 Salk. 187.

(e) 1 Roll, Ab. 851.

(f) 6 Rep. 15. a.

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[† Upon the subject of this and the nine preceding sections, see title 39, the chapter on Merger, by the Editor.]

<sup>1</sup> In many of the United States, it is expressly enacted that no deed of a tenant for life or years shall pass any greater estate than he might lawfully convey. See *ante*, tit. 3, ch. 1, § 36, note. Of course no remainder or reversion can by such deed be divested, and, therefore, no forfeiture incurred. But a tenant for years forfeits his term by a refusal *in pais* to pay rent, by denying the title of his landlord, and by accepting an adverse title. *Jackson v. Vincent*, 4 Wend. 633.



51. With respect to forfeitures by matter of record, it may be laid down as a general rule, that every act by matter of record, which operates as a forfeiture of an estate for life, will also operate as a forfeiture of an estate for years. (a) <sup>1</sup>

(a) Tit. 3. c. 1. s. 37.

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[<sup>1</sup> An absolute parol lease, made during the term of a written lease, by the landlord to a new tenant, with the consent of the first lessee, amounts to a surrender of the first lease. *Whitney v. Myers*, 1 Duer, (N. Y.) 266. An abandonment of the premises by the tenant authorizes the landlord to enter. *Baker v. Pratt*, 15 Ill. 571; *Schuisler v. Ames*, 16 Ala. 73. Where the condition of the lease was that the tenant should not cut off wood and timber from the premises except for firewood and fencing timber, and the tenant did cut other timber, it was held a forfeiture, and that it could not be avoided by the tenant's showing that all he cut was not more than enough for firewood and fencing timber, and that he cut fencing timber from other land. *Clarke v. Cummings*, 5 Barb. Sup. Ct. 339. A disclaimer by parol of his landlord's title, does not forfeit a written lease for years. *De Lancey v. Ga Nun*, 12 Barb. Sup. Ct. 120. The receipt of rent by landlord from the tenant, accruing after acts of forfeiture known to the landlord, is a waiver of the forfeiture. *Clarke v. Cummings*, 5 Barb. Sup. Ct. 339; *Camp v. Pulver*, Ib. 91.]

## TITLE IX.

## ESTATE AT WILL, AND AT SUFFERANCE.

## BOOKS OF REFERENCE UNDER THIS TITLE.

- COKE upon LITTLETON, 55. *a.*—57. *b.*  
 WOODFALL'S Law of Landlord and Tenant. (Wollaston's ed.)  
 SMYTHE'S Law of Landlord and Tenant in Ireland.  
 COMYN'S Law of Landlord and Tenant. (Chilton's ed.)  
 KENT'S COMMENTARIES. Vol. IV. Lect. 56.  
 BLACKSTONE'S COMMENTARIES. Book II. ch. 9.  
 FLINTOFF on Real Property. Vol. II. Book I. ch. 3.  
 LOMAX'S Digest. Vol. I. tit. 8.  
 [TAYLOR'S American Law of Landlord and Tenant, (2d edition.)]

## CHAP. I.

## ESTATE AT WILL.

## CHAP. II.

## ESTATE AT SUFFERANCE.

## CHAP. I.

## ESTATE AT WILL.

- SECT. 1. *Description of.*  
 3. *May arise by Implication.*  
 4. [*Or by Deed.*]  
 6. *Is at the will of both Parties.*  
 7. *Not grantable over.*  
 9. *This Tenant sometimes entitled to Emblements.*  
 11. *Cannot commit Waste.*  
 12. *What determines this Estate.*

- SECT. 15. *Six Months' Notice to quit necessary.*  
 16. *Tenancies from Year to Year.*  
 23. *Bind the Persons in Reversion.*  
 24. *And devolve to Executors.*  
 26. *Six Months' Notice to quit necessary.*

SECTION 1. "*Tenant at will*," (says Littleton, s. 68,) "is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is *in possession*."<sup>1</sup> In this case, the lessee is called

<sup>1</sup> The tenancy is not created until the entry of the lessee. *Pollock v. Kittrell*, 2 Tayl. 153.

tenant at will, because he hath no certain or sure estate; for the lessor may put him out at what time it pleaseth him."

2. Littleton also says, that if a man lets lands to another, to have and to hold to him and to his heirs, at the will of the lessor, the words to the heirs of the lessee are void; for if the lessee dies, and the heir enters, the lessor shall have an action of trespass against him. (a)

\*3. An estate at will *may arise by implication*, as well \*243 as by express words. Thus if a tenant for years holds over his term, and continues to pay his rent as before, such payment and acceptance of rent creates an estate at will. So, where a person makes a feoffment, and delivers the deed to the feoffee, without giving him livery of seisin, and the feoffee enters, he becomes tenant at will. And in a modern case it was held that where a person entered, and enjoyed lands under a lease that was void, paying rent, he was tenant at will. (b)

[So, also, it seems to be the better opinion that a person entering under an *agreement for a lease* must be considered a tenant at will, but the point is not free from doubt. (c)]

And upon similar principles a person entering under a *contract for the purchase* of an estate with the consent of the vendor, must be deemed a tenant at will. (d)<sup>1</sup>

In both the preceding cases the possession of the tenant must be referred either to a legal or adverse title; but as the entry is with the consent of the person entitled to the possession, it cannot be considered adverse; and as the agreement confers no legal title, the only alternative seems to be, that the person in possession must, by construction of law, be considered tenant at will.<sup>2</sup>

(a) Litt. s. 82. (b) 10 Vin. Ab. 400. Lit. s. 70. Denn v. Fearnside, 1 Wils. R. 176.

(c) Hegan v. Johnson, 2 Taunt. 148. Dunk v. Hunter, 5 Barn. & Ald. 322. Doe v. Lawder, 1 Stark. 308.

(d) Right v. Beard, 13 East, 210. Doe v. Jackson, 1 Bar. & Cress. 448. Doe v. Sayer, 3 Camp. 8.

<sup>1</sup> [A bond from A to convey to B certain premises, upon the payment by B of a certain note on demand, and interest quarterly, and in the mean time to allow B possession of the premises, does not create a mere tenancy at will so long as B punctually pays the interest, and the principal is not demanded; a trespass will lie by B against one who removes him, under a deed from A, given subsequently to such bond. White v. Livingston *et al.*, 10 Cush. 259.]

<sup>2</sup> Where one is let into the possession and occupancy of lands under a *verbal contract to purchase*, no rent being reserved; if the vendee does not fulfil the contract, he

4. Where an estate is in mortgage, and the mortgage deed contains the usual clause, that the mortgagor shall hold until default in payment of principal or interest, the *mortgagor*, while he continues in the actual possession under this agreement, would, it seems, be considered *tenant for years*, or from year to year. After default, if the mortgagor continues in actual possession, and there is no new agreement between the parties, he is, until payment of interest or other recognition of the tenancy, *tenant by sufferance*. (a)

If the mortgage deed does not contain any clause that the mortgagor shall hold until default, and the mortgagor continues in actual possession, he is *tenant at will*.] (b)

5. As the tenant at will acquires the possession by the consent of the owner, there is a *privity of estate* between them;<sup>1</sup> but no fealty is due. (c)

6. Lord Coke says, every lease at will must in law be *at the will of both parties*; therefore where a lease is made, to have and to hold at the will of the lessor, the law implies it to 244 \* be at \* the will of the lessee also. So it is when the lease is made to have and to hold at the will of the lessee, this must also be at the will of the lessor. (d)

7. A tenant at will has no certain and indefeasible estate, *nothing that can be granted by him* to a third person; because

(a) *Powseley v. Blackman*, Cro. Jac. 659. See sect. 16. *Partridge v. Bere*, 5 B. & Ald. 605, n. (a.) *Hall v. Surtees*, Ib. 687. *Doe v. Maisey*, 8 B. & C. 767. *Doe v. Giles*, 5 Bing. 431. Ch. 2. s. 1, 2.

(b) *Keech v. Hall*, Dougl. 22.

(c) Lit. s. 132, 460. 1 Inst. 270. b.

(d) 1 Inst. 55. a.

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is nevertheless not a tenant from year to year, nor entitled to notice to quit; nor is he a trespasser, until possession has been demanded of him, and refused. And if, on the other hand, the contract fails on the ground of the vendor not being able to make a good title, the purchaser is not liable in an action for use and occupation. *Carson v. Baker*, 4 Dev. 220; *Winterbottom v. Ingham*, 7 Ad. & El. 611, N. S.; 10 Jur. 4 S. C. [A landlord, by delay to enter after the term has expired, may allow the tenant to acquire the rights of a tenant at will, upon the presumption that he acquiesced in his continued possession, but the burden is on the tenant to show this. *Chesley v. Welch*, 37 Me. (2 Heath) 106. A tenancy cannot be implied from the fact that a vendor remains in the possession of the premises after a sale, so as to authorize an action for use and occupation. *Greenup v. Vernor*, 16 Ill. 26; *Dakin v. Allen*, 8 Cush. 33; *Dolittle v. Eddy*, 7 Barb. Sup. Ct. 74; *Dowd v. Gilchrist*, 1 Jones's Law, (N. C.) 353; *Whitney v. Cochran*, 1 Scam. 209; *Glascocock v. Robards*, 14 Mis. 350.]

<sup>1</sup> He is, therefore, capable of taking a fee simple by release, operating by way of enlargement of his estate. Litt. § 460; 1 Inst. 270 b.; *Post*, tit. 32, ch. 6.

the lessor may determine his will, and put him out, whenever he pleases.<sup>1</sup> Therefore if a tenant at will assigns over his estate to another, who enters on the land, he is a disseisor, and the landlord may have an action of trespass against him. (a)<sup>2</sup>

8. A lessee at will made a lease for years, and the lessor entered. Resolved on solemn argument, — 1. That this was only a disseisin at election, and not *primâ facie*. 2. That admitting it to be a disseisin, the lessee at will, not the lessee for years, was the disseisor, and had gained the freehold. (b)

9.\* Where an estate at will is determined by the lessor, the tenant is entitled to the corn sown, and other *emblements*.<sup>3</sup> Otherwise where the estate is determined by the lessee. (c)

10. If a person makes a lease at will, and is afterwards outlawed, by which the will is determined, the king shall have the profits; yet the lessee at will shall have the corn that was sown. But if a lessee at will be outlawed, the king shall have the emblements. (d)

11. Tenants at will have *no power of committing any kind of voluntary waste*; for if a tenant of this kind cuts down timber trees, or pulls down houses, the lessor may bring an action of trespass against him. But such tenants not being within the Statute of Gloucester, no action of waste † lies against them.

(a) 1 Inst. 57. a.

(b) *Blunden v. Baugh*, Cro. Car. 302.

(c) Lit. s. 68. *Oland's case*, 5 Rep. 116.

(d) *Idem*.

<sup>1</sup> But if a stranger enter and throw down the fences erected by the tenant at will for his own convenience, or tread down the grass or corn, the tenant, and not the landlord, shall have trespass against the wrongdoer; the injury not being to the permanent rights of the landlord. *Little v. Palister*, 3 Greenl. 6; *Brown v. Bates*, Brayt. 230.

<sup>2</sup> Where the tenant at will assented to the extent of an execution against him upon the land, showing it to the creditor as his own property, without giving notice of any paramount title, and assisting the surveyor in setting off the land; it was held, that the tenancy at will was thereby determined, and that the tenant and the creditor were trespassers. *Campbell v. Procter*, 6 Greenl. 12. And see *Love v. Edmonston*, 1 Ired. 152.

<sup>3</sup> [*Simpkins v. Rogers*, 15 Ill. 398.]

[† The writ of waste, among many others, is abolished after the 1st day of June, 1835, by Stat. 3 & 4 Will. 4, c. 27, s. 36, 37, except in cases provided for by s. 38,—that is, when on the above day any person, whose right of action shall be taken away by descent cast, discontinuance, or warranty, might maintain such writ, &c., then such writ, &c., may be brought after the above day, but only within the period during which an entry might have been made under the act, if such right of entry had not been taken away.

This exception should be added to the notes on pages, 26, 52, 120, 135, 141, *supra*.]

And as to permissive waste, there is no remedy against them, for they are not bound to repair or sustain houses, like tenants for years.<sup>1</sup> (a)

12. With respect to the acts which amount to a *determination of an estate at will*, on either side, the first and most obvious mode of determining it by the lessor, is an *express declaration* 245 \* *ation* that the lessee shall hold no longer; which must either be made on the land, or else notice of it given to the lessee. (b)

13. Any *act of ownership*, exercised *by the landlord*, which is *inconsistent* with the nature of this estate, will also operate as a determination of it. Thus if he *enters* on the land, and *cuts down trees* demised, or makes a *feoffment*,<sup>2</sup> or a *lease* for years to commence immediately, the estate at will is thereby determined.<sup>3</sup> On the other side, any *act of desertion*, or which is inconsistent with this estate, done *by the tenant*, will also operate as a determination of the estate. Thus if the tenant *assigns* over the land to another, or commits an act of *waste*, his estate is thereby determined.<sup>4</sup> But a verbal declaration by the lessee that he will not hold the lands any longer, does not determine the estate, unless he also waives the possession.† (c)

14. *Neither party* can determine an estate at will at a time

(a) 1 Inst. 57. a. Tit. 3. c. 2. Lit. s. 71. Lady Shrewsbury's case, 5 Rep. 13. b.

(b) 1 Inst. 55. b. (Ellis v. Paige, 1 Pick. 43. Bradley v. Covel, 4 Cow. 349.)

(c) (Keay v. Goodwin, 16 Mass. 1.) 1 Inst. 55. b. 57. a. (Jackson v. Babcock, 4 Johns. 418. Phillips v. Covert, 7 Johns. 1.)

<sup>1</sup> This applies only to tenants at will in the strict sense of the word; and not to tenants from year to year, for these are within the statute. 1 Saund. 323, b, note (7); 2 Inst. 302; Co. Lit. 54, b.

<sup>2</sup> Or, a partition, where the lease was of the estate in common. Rising v. Standnard, 17 Mass. 282. [So if the lessor recovers judgment for possession against the lessee, this terminates the tenancy of a sub lessee who is in by verbal permission. Hatstat v. Packard, 7 Cush. 245.]

<sup>3</sup> [Benedict v. Morse, 10 Met. 229; Kelly v. Waite, 12 Ib. 300; Howard v. Merriam, 5 Cush. 563; Furlong v. Leary, 8 Cush. 409. But the tenant should have notice before he can be ejected by forcible entry and detainer process. Furlong v. Leary, *ut supra*.]

<sup>4</sup> [Cooper v. Adams, 6 Cush. 87.] So, if he receives a conveyance of title from a stranger. Bennock v. Whipple, 3 Fairf. 346. [But it cannot be done even by assignment, without giving notice to the landlord. Pinhorn v. Sonster, 20 Eng. Law & Eq. 501.]

[† In Doe v. Price, 9 Bing. 356, the Court of C. B. decided that a letter to the following effect from the owner to the tenant at will, or from the agent of one to the agent of the other, is a sufficient determination of the will: — "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property."]

which would be *prejudicial to the other*. Therefore if the lessee determines his will before the day on which the rent becomes due, he must, notwithstanding, pay it up to that time. And if the lessor determines his will before the rent is due, he loses it. But if either party die before the rent is due, this act of God shall not be productive of any injury; for the lease, if it be a house, shall continue till the next rent day; and if it be of lands, commencing at Michaelmas, it shall continue till the summer profits are received by the representatives of the tenant. (a)

15. It has been settled by several modern cases that *six months' notice to quit* must be given by a landlord to his tenant at will, or to his personal representatives, before the end of which time an ejectment will not lie.

16. The courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will; but have rather held them to be *tenancies from year to year*, as long as both parties please; especially where an annual rent is reserved.<sup>1</sup> And in a modern case, Mr. Justice Wilmot said, that—"In the country, leases at will, in the strict legal notion of an estate at will, being found extremely inconvenient, exist only notionally, and were \*succeeded by another species of contract which was less \*246 inconvenient." Mr. Hargrave has remarked on this passage, that it means, not that estates at will may not arise now, as well as formerly, but only that it is no longer usual to create such estates by express words, and that the judges incline strongly against implying them. (b) <sup>2</sup>

(a) 1 Inst. 55. b. n. 16. Leighton v. Theed, 1 Ld. Raym. 707.

(b) 3 Burr. R. 1609. 1 Inst. 55. a. n. 3.

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<sup>1</sup> It was formerly thought that a tenancy from year to year, so long as both parties pleased, was a tenancy for two years at least, and was not determinable at the end of the first year. But it is now settled, that such a tenancy is determinable at the end of any year, the first as well as any subsequent year; unless, in the creation of the tenancy, the parties used expressions showing that they contemplated a tenancy for two years at least. Doe d. Clarke v. Smaridge, 7 Ad. & El. 957, 959, N. S.; 9 Jur. 781, S. C. And see Doe d. Chadborn v. Green, 9 Ad. & El. 658. If, at the end of the first year, the lessee, without countermand of the lessor, enters upon the second year, he is bound for that year, and so on. Per Holt, C., in Dodd v. Monger, Holt, 416; 6 Mod. 215, S. C.

<sup>2</sup> The law of tenancies at will, and from year to year, as understood in the United States, is thus stated by Chancellor Kent:—"Estates at will, in the strict sense, have become almost extinguished, under the operation of judicial decisions. Lord Mansfield observed, — 3 Burr. 1607, — that an infinite quantity of land was holden in Eng-

17. A tenant *from year to year* having acquired the possession by the consent of the owner, as well as tenant at will, there is a *privity of estate* between them. (a)

(a) *Ante*, s. 5. Lit. s. 460.

land without lease. They were all, therefore, in a technical sense, estates at will; but such estates are said to exist only notionally, and where no certain term is agreed on, they are construed to be tenancies from year to year, and each party is bound to give reasonable notice of an intention to terminate the estate. The language of the books now is, that a tenancy at will cannot arise without express grant or contract, and that all general tenancies are constructively tenancies from year to year. \*Preston on Abstracts of Title, Vol. II. 25; Wilmot, J., 3 Burr. 1609. If the tenant holds over by consent given, either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year. The moment the tenant is suffered by the landlord to enter on the possession of a new year, there is a tacit renovation of the contract for another year; and half a year's notice to quit must be given, prior to the end of the term. Bro. Abr. tit. Lease, pl. 53; Layton v. Field, 3 Salk. 222; Jackson v. Salmon, 4 Wendell, 327. The tenant does not know in what year the lessor may determine the tenancy, and in that respect he has an uncertain interest, on which the doctrine of notice and of emblements is grounded. Kingsbury v. Collins, 4 Bingham, 202. The ancient rule of the common law required, in the case of all tenancies from year to year, six months' notice on either side, and ending at the expiration of the year, to determine the tenancy; and there must be a special agreement, or some particular custom, to prevent the application of the rule. This tenancy from year to year succeeded to the old tenancy at will, and it was created under a contract for a year, implied by the Courts. The tenancy cannot be determined except at the end of the year. Leighton v. Theed, 1 Ld. Raym. 707; Doe v. Snowden, 2 Wm. Blacks. Rep. 1224; Doe v. Porter, 3 Term Rep. 13; Porter v. Constable, 3 Wils. 25; Right v. Darby, 1 Term Rep. 159; Roe v. Wilkinson, cited from MSS. in Butler's note 228 to Co. Litt. lib. 3. The English rule of six months' notice prevails in many of the United States; but there is a variation in the rule, or perhaps no fixed established rule on the subject, in other parts of the United States. Justice and good sense require that the time of notice should vary with the nature of the contract and the character of the estate. Though the tenant of a house is equally under the protection of notice as the tenant of a farm, yet, if lodgings be hired, for instance, by the month, the time of notice must be proportionably reduced. Right v. Darby, 1 Term Rep. 159; Doe v. Hazell, 1 Esp. N. P. Rep. 94. If the tenant holds from month to month, a month's notice to quit must be given. Prindle v. Anderson, 19 Wendell, 391. In *Pennsylvania*, the common law notice of six months is understood to be shortened to three months, as well in cases without, as within the statute of that State, passed in the year 1772. Gibson, J., in Logan v. Herron, 8 Serg. & Rawle, 458.

"The reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year. De Grey, Ch. J., in 2 Wm. Blacks. 1173. If the tenant be placed on the land, without any terms prescribed, or rent reserved, and as a mere occupier, he is strictly a tenant at will,—Jackson v. Bradt, 2 Caines' Rep. 169,—and an actual tenant at will has not any assignable interest, though it is sufficient to admit of an enlargement by release. Litt. sec. 460; Co. Litt. 270, b. On the other hand, estates which are constructively ten-



18. A general parol demise at an annual rent, where the bulk of the farm was inclosed, and a small part in open common fields, was held to be a tenancy from year to year.

ancies for the term of a year, or from year to year may be assigned. Preston on Abstracts of Title, Vol. II. 25. A strict tenant at will, in the primary sense of that tenancy, has been held not to be entitled to notice to quit, — *Jackson v. Bradt*, 2 Caines' Rep. 168, — but the later and more liberal rule seems to be, that tenants at will are regarded as holding from year to year, so far as to be entitled to notice to quit before they can be evicted by process of law. Or even without that assumption, if the party came into possession with the consent of the owner, and for an indefinite period, he is entitled to notice to quit. *Parker v. Constable*, 3 Wils. Rep. 25; *Right v. Beard*, 13 East's Rep. 209; *Jackson v. Bryan*, 1 Johns. Rep. 322; *Jackson v. Langhead*, 2 Ibid. 75; *Jackson v. Wheeler*, 6 Ibid. 272; *Phillips v. Covert*, 7 Ibid. 1, 4; *Bradley v. Covell*, 4 Cowen's Rep. 349; *Ellis v. Paige*, 2 Pick. 71. There is no uniform rule on the subject, for it was held in *Doe v. Barker*, 4 Dev. N. C. Rep. 220, that where a person takes possession of land by the license of the owner for an indeterminate period, without any rent reserved, he is not a tenant from year to year, but a remaining instance of the old strict common-law tenancy at will, and is not entitled to notice to quit. It is settled, however, that notice is not requisite to a tenant, whose term is to end at a certain time; for, in that case, both parties are apprized of their rights and duties. The lessor may enter on the lessee when the term expires, without further notice. *Messenger v. Armstrong*, 1 Term Rep. 54; *Right v. Darby*, Ibid. 162; *Jackson v. Bradt*, 2 Caines, Rep. 160; *Jackson v. Parkhurst*, 5 Ibid. 128; *Bedford v. McElhetton*, 2 Serg. & Rawle, 49; *Ellis v. Paige*, 1 Pick. Rep. 43. Nor is a tenant who disclaims his landlord's title entitled to notice to quit. *Woodward v. Brown*, 13 Peters' U. S. Rep. 1. Except for the purpose of notice to quit, tenancies at will seem even still to retain their original character. 7 Johns. Rep. 4; *Nichols v. Williams*, 8 Cowen's Rep. 13." 4 Kent, Comm. 111—114.

If there be no tenancy, or existing and admitted relation of landlord and tenant, the doctrine of notice to quit does not apply. *Jackson v. Deyo*, 3 Johns. 417.

The English rule of six months' notice has been recognized in *Vermont*; *Hanchet v. Whitney*, 1 Verm. R. 311; in *Kentucky*; *Hoggins v. Becraft*, 1 Dana, R. 30; and in *Tennessee*; *Trousdale v. Darnell*, 6 Yerg. 431. In *Pennsylvania*, it is reduced to three months. *Logan v. Herron*, 8 S. & R. 458, per Gibson, J. See 4 Kent, Comm. 113, 114. In some other States, no precise rule seems to have been adopted. In others, it has been regulated by statutes. Thus, in *Delaware*, the landlord may determine a tenancy at will by three months' notice to quit. Del. Rev. St. 1829, p. 226. In *Maine*, *New Hampshire*, *Massachusetts*, *Michigan*, and *Indiana*, three months' notice, by either party, may determine this tenancy, for any cause. And if the rent is payable oftener than quarter yearly, then notice equal to the interval between the rent-days is sufficient, in *Maine*, *Massachusetts*, *Michigan*, *Indiana*, [and *Illinois*. *Prickett v. Ritter*, 16 Ill. 96. But the notice must not only be as long as the interval between the days of payment, but must terminate at the expiration of such interval; and the date of the notice, in the absence of other evidence, cannot be presumed to be one of the days on which rent was payable. *Prescott v. Elm*, 7 Cush. 346; and the notice must state the cause for which it was given, and the time when the tenant is required to quit. *Currier v. Barker*, 2 Gray, 224; *Steward v. Harding*, Ib. 335. Without such notice to quit, and also after such notice to quit, and before the term for which it was given has expired, the lessee at will, who has not determined the estate by any act of his own, has a lawful and exclusive possession, not only as against a stranger, but also

19. An ejectment was brought to recover the possession of a farm of about sixty acres of land, of which fifty-one were enclosed,

against the lessor at will; *Dickinson v. Goodspeed*, 8 Cush. 119. *Howard v. Merriam*, 5 Ib. 563.] But if the cause is the non-payment of rent, then ten days' notice is sufficient, in *Indiana*; seven days' in *New Hampshire*; [*Currier v. Perley*, 4 Foster, (N. H.) 219;] thirty days' in *Maine*, [*Smith v. Rowe*, 31 Maine, 1 Red. 212,] and fourteen days' in *Michigan*. And in *Massachusetts*, "in all cases of neglect or refusal to pay the rent due according to the terms of any written lease, fourteen days' notice, given in writing by the landlord to the tenant," is sufficient not only to determine the lease, but also to entitle the landlord to eject the tenant by the summary process of forcible entry and detainer. [See also, Acts 1847, ch. 267, § 1; 1856, ch. 85. A notice requiring the tenant "being in arrears of rent" to deliver up the premises "forthwith" is insufficient. *Oakes v. Munroe*, 8 Cush. 282. The notice need not be to quit at the expiration of any term or interval, at which the rent becomes due, but should state a day or time to quit at or after the expiration of the required time of notice, by definitely naming the day, or denoting such time with reasonable exactness and certainty. *Currier v. Barker*, 2 Gray, 228.] In *New York*, tenancies at will may be determined by the landlord by one month's notice, for any cause; in *Connecticut*, by thirty days' notice; and in *South Carolina*, by ten days' notice, if the lease be in writing. In *Florida*, if the cause be non-payment of rent, three days' notice is sufficient. See LL. Maine, 1840, ch. 95, § 19; LL. New Hamp. 1842, ch. 209, § 1—5; LL. Mass. 1836, ch. 60, § 26; 1847, ch. 267; LL. Mich. 1837, p. 265; LL. Indiana, 1843, ch. 28, § 142, 143; LL. N. York, Vol. II. p. 30, § 7, 3d ed.; LL. Connecticut, 1838, tit. 57, ch. 60; LL. South Car. Vol. V. p. 676, 2 Brev. Dig. p. 16; Thompson's Dig. LL. Florida, p. 398. [*Howell v. Howell*, 7 Ired. Law (N. C.) 496; *Phelps v. Long*, 9 Ib. 226. A tenancy from year to year of a farm used for agricultural purposes, looks to the end of the calendar year for its termination, and if the landlord would determine it, he must, during the current year, give notice of his intention to do so at the end of the year. *Floyd v. Floyd*, 4 Rich. 23. A notice demanding possession and stating that if possession is not given by a certain day, rent at a given rate will be claimed, is not sufficient. *Ayres v. Draper*, 11 Mis. 548. Sufficient notice to quit was given the tenant. At the expiration of the notice, at the request of the tenant, and for his convenience, the landlord permitted the tenant to remain a short time. Held not to be a waiver of the notice and renewal of the tenancy. *Babcock v. Albee*, 13 Met. 273. But when the lessor, after notice to quit, accepts rent from the lessee for a time subsequent to the expiration of the notice, he waives the notice and continues the tenancy. *Collins v. Carty*, 6 Cush. 415. Where notice to quit is given "for non-payment of rent" the landlord is limited to that ground of recovery. *Tuttle v. Bean*, 13 Met. 275. Where a tenancy at will under a parol lease dependent on a condition, (the condition was that the premises should be kept open as a barber's shop,) is determined by a breach thereof, neither of the parties is entitled to notice under the statute permitting a tenancy at will to be determined by giving three months' notice; and if the tenant holds over, he is a tenant at sufferance. *Creech v. Crockett*, 5 Cush. 133. The provisions of the statute do not apply, where the tenancy is terminated according to the principles of the common law by the consent of both parties. *Cooper v. Adams*, 6 Cush. 87. The owner of land leased it by parol for a year in consideration that the lessee should take care of certain trees thereon. The lessee did not take such care. Held that the lessor could not terminate the tenancy without notice to quit. *Gleason v. Gleason*, 8 Cush. 32. A lessee under a parol agreement to pay rent quarterly in advance, is liable, on his failure to do so, to the landlord and tenant process, without notice to quit. *Elliott v. Stone*, 1 Gray, 571.]

and the rest lay in open fields. The taking was from Old Lady-day, 1767, without any fixed term, at £40 a year rent, payable at Michaelmas and Ladyday. It was proved that a custom prevailed, where a tenant took a farm in that township, of which part consisted of open common field, for an uncertain term, that it should be considered as a holding from three years to three years. Lord Chief Justice De Grey said, that all leases for uncertain terms were, *primâ facie*, leases at will; that the reservation of an *annual rent* turned them into leases *from year to year*. It was possible that circumstances might make it a lease for a longer term, as when the crop did not come to perfection in less than two years. And he would not say that the nature of the ground or the course of husbandry, might not deserve to be considered, when such a custom came nakedly before the Court. As a custom, the claim could not be supported; therefore it was a lease from year to year. (a)

20. Where a tenant for life granted a lease for years, which was void against the remainder-man, and the latter, before he elected to avoid it, received rent from the tenant; it was held to be a tenancy from year to year. (b)

21. Where an agreement for a *longer term than three years* is made *by parol*, which is void as to the duration of the term, by the Statute of Frauds; there is a tenancy from year to year, regulated in every other respect by the agreement. (c)<sup>1</sup>

(a) *Roe v. Rees*, 2 Blackst. 1171.

(b) *Doe v. Weller*, 7 Term R. 478.

(c) *Doe v. Bell*, 5 Term R. 471. Tit. 32. c. 3.

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In the State of *Indiana*, it is provided by statute, that estates not expressly declared to be estates at will, shall be deemed tenancies from year to year. And provisions substantially the same are found in the codes of *Delaware* and *South Carolina*. But in *New Hampshire*, this rule is reversed, and all tenancies are deemed tenancies at will, unless it be otherwise proved. *Ibid*.

In *Massachusetts*, it has been doubted whether, under the statutes of that State, prior to the revised code of 1836, a tenant at will was entitled to six months' notice to quit; but it was conceded, upon very full and elaborate consideration, that he was at least entitled, of common justice, to reasonable time to remove from the premises; and that what constituted reasonable time, was a question for the Court to determine, under the circumstances of the case. *Rising v. Stannard*, 17 Mass. 287; *Ellis v. Paige*, 1 Pick. 43, with the learned opinion of Putnam, J., in the same case, in 2 Pick. 71, note; *Coffin v. Lunt*, 2 Pick. 70; *Keay v. Goodwin*, 16 Mass. 1.

<sup>1</sup> Wherever a tenant holds over, and there is no evidence of any new and different stipulation, the law will imply the continuance of all those terms in the original lease, which are applicable to his situation. *De Young v. Buchanan*, 10 G. & Johns. 149; *Phillips v. Monges*, 4 Whart. 226; *Doe v. Geekie*, 5 Ad. & El. 841, N. S. Upon the

247 \*      \* 22. In a subsequent case, it appeared in evidence that the defendant had held the premises for two or three years, under a parol demise for twenty-one years; this being void by the Statute of Frauds, it was contended at the trial that the holding should have been stated according to the legal operation of it, as a tenancy at will. Mr. Justice Rooke, considering it as a tenancy from year to year, overruled the objection. Upon a motion to set aside the verdict, on the ground of a misdirection, Lord Kenyon said the direction was right; for such a holding now operated as a tenancy from year to year. The meaning of the Statute of Frauds was, that such an agreement should not operate as a term. But what was then considered as a tenancy at will, had since been properly construed to enure as a tenancy from year to year. (a)

23. Where a tenancy from year to year has once commenced, it *continues against any person* to whom the lessor afterwards grants the reversion. And Mr. Justice Buller has said,—“It would be unjust to a tenant to say he should be turned out by the assignee of a reversion, or by any person claiming under his lessor, when he could not be turned out by the lessor himself. On the other hand, it is no injustice, it is no hardship on the assignee, to say, he must comply with the same rules and conditions, as the person, of whom he bought, has subjected himself to.” And in a subsequent case it was held, that a tenancy from year to year would continue against an infant. (b)

24. Tenancies from year to year do not determine by the death of the tenant, but *devolve to his executors* or administrators.

25. A person having an estate from year to year died intestate; the question was, what interest vested in his administrator.

Lord Kenyon said,—Whatever chattel the intestate had must vest in the administrator, as his personal representative. Then it was supposed that some inconveniences might result from such a determination, but he saw none; and many inconveniences

(a) *Clayton v. Blakey*, 8 Term R. 3.

(b) *Birch v. Wright*, 1 Term R. 378. *Maddon v. White*, 2 Term R. 159.

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expiration of the lease, the landlord has his election, to treat him either as a trespasser, or as a tenant holding over. *Conway v. Starkweather*, 1 Denio, R. 113. [*Baker v. Root*, 4 McLean, 572; *Kendall v. Moore*, 30 Maine, (17 Shep.) 327; *Strong v. Crosby*, 21 Conn. 398; *Ames v. Schuesler*, 19 Ala. 600; *Jackson v. Patterson*, 4 Harring, 534; *Walker v. Ellis*, 12 Ill. 476; *Prickett v. Ritter*, 16 Ib. 96.]

might attend a different decision. The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. In order to obviate them, the Courts very early raised an implied contract for a year;<sup>1</sup> and added, that the tenant could not be removed at the end of the year, without receiving six months' previous notice. All the inconveniences \* which arose between the original parties them- \* 248 selves, and against which the wisdom of the law had endeavored to provide, by raising the implied contract, existed equally in the case of their personal representatives. (a)

26. It appears from the preceding case, and many others, that a *tenant from year to year* is entitled to *six months' notice to quit*, ending at the expiration of the year; and that he must also give the landlord the same notice.

27. [A tenant at will is *capable of taking a release* of the inheritance after he has entered upon the premises, for he has then an estate; but it is otherwise with a tenant at sufferance, who has a possession, but no privity. The estate of a tenant at will cannot be the foundation of a remainder.] (b)

(a) *Doe v. Porter*, 3 Term R. 13. 15 Ves. 241. *Rex v. Stone*, 6 Term R. 295.

(b) Lit. s. 460. (1 Inst. 270, b.) 8 Co. Rep. 75, a.

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<sup>1</sup> See *Doe d. Clarke v. Smaridge*, 7 Ad. & El. 957, N. S.; *Ante*, § 16, n.

## CHAP. II.

## ESTATE AT SUFFERANCE.

SECT. 1. <i>Description of.</i>	SECT. 9. <i>Acceptance of single Rent no Bar to Recovery.</i>
5. <i>This Tenant to pay double Value after Notice.</i>	11. <i>Tenants giving Notice to quit, and holding over, to pay double Rent.</i>
6. <i>Who may give Notice.</i>	
7. <i>At what Time.</i>	

SECTION 1. "*Tenant at sufferance*," (says Lord Coke,) "is he that at first came in by lawful demise, and after his estate ended continueth in possession; and wrongfully holdeth over."<sup>1</sup> Thus,

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<sup>1</sup> This species of estate, Chancellor Kent remarks, is too hazardous to be frequent; and it is not likely to occur since the Statutes of 4 Geo. 2, c. 28, and 11 Geo. 2, c. 19, imposing double rent upon the tenant holding over after notice to quit, so long as he remains upon the premises. The provisions of these statutes have been substantially reenacted in *New York* and *South Carolina*, and in some other States, though they have not been generally adopted in this country. The landlord, however, may also recover the premises by an action of ejectment. But whether, independent of any statute provision, and with gentle and barely adequate force, he might enter upon the tenant holding over, and remove him and his goods, without any agreement to that effect in the lease, may be doubted. It has been held that the sheriff might so enter to levy a *fiery facias* upon the unexpired interest of the tenant in the term, using only such gentle force as might be requisite for the purpose; and that the tenant had no remedy against him for so doing, nor against the purchaser of the term at the sheriff's sale, for the like entry. *Taylor v. Colé*, 3 T. R. 292; 1 H. Bl. 555, S. C. But as between landlord and tenant, it seems that to justify the forcible expulsion of the tenant, the landlord must first have entered peaceably and without force, and thereby gained the peaceable possession. *Taunton v. Costar*, 7 T. R. 431; *Argent v. Durrant*, 8 T. R. 403; *Newton v. Harland*, 1 M. & Gr. 644. If the tenant has personally left the premises, the landlord may break open the doors to regain possession, though the goods of the tenant are still in the house; for it is no longer his house. *Turner v. Meymott*, 1 Bing. 158. And see *Dorrell v. Johnson*, 17 Pick. 263, 266. In some of the United States it has been held, in accordance with the above English decisions, that the landlord cannot justify an entry with personal violence, and that though the tenant by sufferance cannot maintain trespass *quare clausum fregit* against him, yet he may have an action for any trespass to his person, committed in making the forcible entry upon him. *Sampson v. Henry*, 13 Pick. 36; 11 Ib. 379. In *New York*, it has been decided, that in the case of a tenant holding over, and in all other cases where one has a title to enter, the owner may regain the lawful possession by force, even though he may be liable for the force used,

where a tenant *pour auter vie*, continues in possession after the death of *cestui que vie*, or a tenant for years holds over his term, they become tenants at sufferance. So where a person makes a lease at will, and dies, the estate is thereby determined; and if the lessee continues in possession, he is tenant at sufferance. (a)<sup>1</sup>

2. Where a man comes to a particular estate by the *act of the party*; there if he holds over, he is *tenant at sufferance*. But where he comes to the particular estate, by *act in law*, as if a guardian, after the full age of the heir, continues in possession, he is not a tenant at sufferance, but *an abator*. (b)<sup>2</sup>

3. No person can be a tenant at sufferance against the king, for no laches can be imputed to his majesty in not entering; therefore, if the king's tenant holds over, he will be considered as an intruder. (c)

4. There is *no privity of estate* between a tenant at sufferance, and the owner of the land; for this tenant only holds by the

(a) 1 Inst. 57. b. (b) 1 Inst. 57. b. 2—134. Vid. sup. p. 243. s. 4.

(c) 1 Inst. 57. b. 2 Leon. 143.

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under the statute against forcible entry and detainer. *Wild v. Cantillon*, 1 Johns. Cas. 123; *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 13 Johns. 235; *Jackson v. Farmer*, 9 Wend. 201. And in England, though the landlord may not forcibly enter upon a tenant, in any case; yet, where the lease contained a clause that in default of performance of covenants on the part of the tenant, it should be lawful for the landlord or his agent to enter upon the premises and take possession, as effectually as a sheriff might do under a writ of *habere fucias*, and that in case of any action being brought for so doing, the defendant might plead leave and license therefor, of which the agreement should be conclusive evidence; and an action of trespass was brought for such entry and forcible expulsion, the declaration also alleging an assault and battery, to which, among other pleas, leave and license was pleaded; — it was held that the agreement was a conclusive answer to the declaration, under such plea, and that if the plaintiff intended to rely upon the assault and battery as distinct from the entry and expulsion, he should have newly assigned the excess. *Kavanagh v. Gudge*, 8 Jur. 362; 7 Man. & Gr. 316, S. C.

<sup>1</sup> If mortgaged premises are sold pursuant to a power contained in the mortgage, the mortgagor, if he remains in possession, is a tenant at sufferance. *Kinsley v. Ames*, 2 Met. 29. So, if the lessee for years, under a parol lease, agrees to quit within the term, if the premises should be sold, and they are sold accordingly, and he continues afterwards in possession, he is a tenant at sufferance. *Hollis v. Pool*, 3 Met. 350. [Where a tenancy at will under a parol lease, dependent on a condition, is terminated by a breach thereof, neither of the parties is entitled to notice to terminate the tenancy, and if the tenant holds over, he is a tenant at sufferance. *Creech v. Crockett*, 5 Cush. 133. A tenant at sufferance is not entitled to notice to quit. *Kelly v. Waite*, 12 Met. 300.]

<sup>2</sup> Or, a disseisor, by election. *Blunden v. Baugh*, Cro. Car. 302; 1 Inst. 57, b. note [383]; *Dyer*, 62, a. pl. 34.

laches of the owner, [so that there cannot be a release  
250\* from the \*latter to the former, which will operate by  
enlargement of his estate.]

5. Tenants at sufferance were *not liable, by the common law, to pay any rent*, because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate.<sup>1</sup> †

[<sup>1</sup> Whether tenants at sufferance in Massachusetts are liable to pay rent, see *Delano v. Montague*, 4 Cush. 42.]

[† But now, by the Statute 4 Geo. 2, c. 28, s. 1, it is enacted, that where any tenant holds over, after demand made, and notice in writing given for delivering the possession, such persons so holding over shall pay double the yearly value of the lands so detained, for so long time as the same are detained; to be recovered by action of debt; against the recovering of which penalty there shall be no relief in equity.

The landlord, by himself, or by his agent lawfully authorized, is the proper person to give notice. But it was held, in a modern case, that a receiver, appointed by the Court of Chancery, is an agent for the landlord, authorized by this act to give a tenant notice to quit the premises; and that a notice in writing to quit is of itself a sufficient demand. *Wilkinson v. Colley*, 5 Burr. 2694.

A notice to quit under this statute may be given previous to the expiration of the lease under which the tenant holds the lands.

Lands were leased from the 10th October, 1763, for eleven years. The person entitled to the reversion gave a written notice to the tenant on the 30th September, 1773, and again repeated the like notice on the 7th October, 1774, or to pay double value. On the 10th October, the reversioner went on the premises, and demanded possession, which was refused. In an action for double value, the jury gave a verdict for the plaintiff. A motion was made for a new trial,—Because, 1. By the Statute 4 Geo. 2, notice to quit must be given after, and not before, the expiration of the term. 2. The lease did not expire till midnight, and possession was demanded in the preceding afternoon. Lord Chief Justice De Grey was of opinion, that the notice to quit might be previous to the expiration of the term. It prevented surprise, and was most for the benefit of both landlord and tenant. Mr. Justice Blackstone said, that a notice or requisition to the tenant to quit at the end of his term, implied that it must be previous.

It would be absurd, because impossible to be complied with, to require *after* the  
251\* expiration of the term \*that the tenant should quit *at* the expiration. The motion was refused. *Cutting v. Derby*, 2 Black. R. 1075.

Although a landlord, after bringing an ejectment, and after the time laid in the demise, should agree to accept the single, instead of the double rent, to which, by the statute, he is entitled, yet he will not be thereby precluded from recovering in the ejectment. It was held, in a modern case, that where a demise is for a certain time, no notice to quit is necessary, at or before the end of the term, to put an end to the tenancy. That a demand of possession, and notice in writing, &c., are necessary to entitle the landlord to double rent or value. That such demand may be made for that purpose six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value, as from the time of such demand, if the tenant holds over. *Cobb v. Stokes*, 8 East, 358.



By the Stat. 11 Geo. 2, c. 19, s. 18, reciting that great inconvenience had happened to landlords, whose tenants had power to determine their leases, by their giving notice to quit, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same; it is enacted,—“That in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained; that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid.” It was resolved, in a modern case, that this act is not confined to those tenants who have a clause in their leases enabling them to quit at the end of seven, eleven, or fourteen years, upon giving notice; but also to parol leases for a year. And that a parol notice was sufficient, because the statute did not require a written one. *Timmins v. Rowlinson*, 1 Black. R. 533; 3 Burr. 1603.

By the Stat. 1 Geo. 4, c. 87, various provisions are made for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants.

\*In *Doe v. Roc*, it was decided that a tenancy by virtue of an agreement in writing, for three months certain, is a tenancy “for a term,” within the meaning of the above acts. But where a tenant holds from year to year, but without a lease or agreement in writing, it is not a case within the first section of the act. 5 Bar. & Ald. 766, 770.]

TITLE X.

COPYHOLD.<sup>1</sup>

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<sup>1</sup> Copyhold Estates being unknown in America, this Title is omitted.

## TITLE XI.

## USE.

## BOOKS OF REFERENCE UNDER THIS TITLE.

LORD BACON'S READING upon the STATUTE OF USES. (By Rowe.)

G. SPENCE, on the Equitable Jurisdiction of the COURT OF CHANCERY. Vql. I.  
Part II. Book III. ch. 2—6.

R. PRESTON, on ESTATES. Vol. I. p. 142—184.

W. F. CORNISH. ESSAY on USES.

CH. BARON GILBERT, on the Law of Uses and Trusts. (Sugden's ed.)

F. W. SANDERS. ESSAY on USES and TRUSTS. (5th ed.)

J. WILSON. TREATISE on SPRINGING USES.

BLACKSTONE'S COMMENTARIES. Book II. ch. 20.

KENT'S COMMENTARIES. Vol. IV. Lect. 61.

LOMAX'S DIGEST. Vol. I. tit. 9.

CHARLES BUTLER. Note to Coke upon Littleton, 271. *b.* note 231.

FLINTOFF on Real Property. Vol. II. Book I. ch. 19.

The source of Roman Law on this subject is in the INSTITUTES of JUSTINIAN,  
Lib. II. tit. 23, with the various commentaries thereon. See also VAN  
DER LINDEN'S Institutes of the LAWS OF HOLLAND, Book I. § 8.

## CHAP. I.

## ORIGIN OF USES.

## CHAP. II.

## NATURE OF A USE BEFORE THE STATUTE 27 HEN. VIII.

## CHAP. III.

## STATUTE 27 HEN. VIII. OF USES.

## CHAP. IV.

## MODERN DOCTRINE OF USES.

## CHAP. I.

## ORIGIN OF USES.

SECT. 1. *Origin of Uses.*

5. *Derived from the Fidei Com-*  
*missum.*

SECT. 11. *Jurisdiction of the Chancel-*  
*lors over Uses.*

13. *Introduction of the Writ of*  
*Subpœna.*

SECTION 1. Having treated of legal and customary estates, we now come to discuss the nature and properties of what are called Equitable Estates.

The original simplicity of the common law admitted of no immediate estate in lands, which was not clothed with the legal seisin and possession. But in process of time a right to the rents and profits of lands, whereof another person had the legal seisin and possession, was introduced; and though not recognized for a long time by the courts of common law, was, 331 \* notwithstanding, supported by the Court of Chancery, and became well known by the name of a use.

2. The introduction of this novelty has been attended with the most important consequences; for though, at first, it appears to have been but a trivial innovation, yet in its progress it has, in fact, produced a revolution in the system of real property, and has introduced a mode of transferring land very different from that which the old law had originally established; for the doctrine of uses is become the foundation of the modern system of conveyancing.

3. A use was created in the following manner:—The owner of a real estate conveyed it by feoffment, with livery of seisin to some friend, with a secret agreement that the feoffee should be seised of the lands to the use of the feoffor, or of a third person. Thus the legal seisin was in one, and the use or right to the rents and profits was in another.

4. It would be a matter of considerable difficulty to ascertain the precise time when this distinction between the legal seisin and the right to the rents and profits was first introduced. It is, however, certain, that the practice of conveying lands to one person, to the use of another, did not become general till the reign of King Edward III., when the ecclesiastics adopted it, in order to evade the Statutes of Mortmain, by procuring conveyances of lands to be made, not directly to themselves, but to some lay persons; with a secret agreement that they should hold the lands for the use of the ecclesiastics, and permit them to take the rents and profits. (a)

5. The idea of a use, and the rules by which it was first regulated, are now generally admitted to have been borrowed by the ecclesiastics from the *Fidei Commissum* of the civil law, of which it will, therefore, be necessary to give some account. (b)

6. By the Roman law, a great number of persons were incapable of being constituted heirs, or even of taking a legacy under

(a) Bac. Read. Ed. 1785. 22. 1 Rep. 123. a.

(b) Bac. Read. 19.

the testament of a Roman citizen ; such as exiles, unmarried persons, those who had no children, &c. In order to evade this law, it became usual for testators to constitute some person to be their heir, who was capable of taking the inheritance ; and to annex a request to the devise, that the person thus constituted heir should give the property to some other person who was incapable of taking directly under the will. *Quibus enim non \*poterunt hæreditatem vel legata relinquere, si relin- \* 332 quebant, fidei committebant eorum qui capere ex testamento poterant. (a)*

7. This was called a *Fidei Commissum*, of which the form is preserved in Justinian's Institute.—*Cum igitur aliquis scripserit, Lucius Titius Hæres esto ; potest adjicere, Rogo te Luci Titi, ut cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, restituas.* And in cases of this kind, the person thus constituted heir was called *Hæres Fiduciarius*, and the person to whom the testator directed the inheritance to be given was called *Hæres Fidei-commissarius. (b)*

8. The *Hæres Fidei-commissarius* had only what the Roman lawyers called a *Jus Precarium*, that is, a right in curtesy, for which the remedy was only by entreaty or request ; so that the *hæres fiduciarius* was under no legal obligation of complying with the request of the testator. *Sciendum itaque est omnia fidei-commissa primis temporibus infirma fuisse ; quia nemo invitatus cogeatur præstare id de quo rogatus erat. Et ideo fidei commissæ appellatæ sunt, quia nullo vinculo juris, sed tantum pudore eorum qui rogabantur, continebantur. (c)*

9. Thus stood the Roman law respecting the *Fidei commissum* for some centuries, during which several frauds were committed by those who, being constituted heirs, with a direction to give the inheritance to some other person, refused to execute the trust reposed in them by the testator, and converted the property to their own use. This induced the Emperor Augustus to direct the consuls to take cognizance of all future cases of this kind.—*Postea Divus Augustus Primus, semel iterumque gratiâ personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere. Quod quia justum videbatur, et populare erat,*

(a) Vinnius, ad Instit. lib. 2. tit. 23. s. 1. (P. Voët, ad eundem.) Just. Inst. lib. 2. tit. 23. s. 1.

(b) Just. Inst. lib. 2. tit. 23. s. 1.

(c) Just. Inst. lib. 2. tit. 23. s. 1.

*paulatim conversum est in assiduam jurisdictionem; tantusque eorum favor factus est, ut paulatim etiam Prætor proprius crearetur, qui de Fidei-commissis jus diceret, quem Fidei-commissarium appellabant. (a.)*

10. The Emperor Justinian completed this system, and extended the rights of the *Hæres Fidei-commissarius* by a law which enacted, that if a testator should direct the person whom he instituted his heir to give either the whole, or a part of the inheritance, to another, and this circumstance could not be proved, either by the written will of the testator, or the testimony of five witnesses, in case the person instituted heir should  
 \*333 refuse to \*comply with the intentions of the testator, he was compellable either to take a solemn oath that the testator had not created *any fidei commissum*, or else to execute the trust reposed in him. (b)

11. Upon the first introduction of uses<sup>1</sup> into the English law, the person to whom a use was limited, who was called the *cestui que use*, was exactly in the same situation with the *Hæres Fidei-commissarius*; and depended entirely on the good faith of the feoffees to uses, or the persons to whom the lands were conveyed. And it is natural to suppose, that while the rights of the *cestui que use* were so extremely precarious, and depended so entirely on the good faith of the feoffee to uses, many breaches of trust were committed. Nor is it improbable but that even the ecclesiastics, who first introduced this species of property, became, in some instances, the dupes of those to whom lands had been conveyed for their use. This induced the clerical chancellors of those times to consider the limitation of a use as similar to a *fidei-commissum*, and binding in conscience; they, therefore, assumed the jurisdiction which the Emperor Augustus had given to the Roman consuls, of compelling the execution of uses in the Court of Chancery.

12. It, however, soon appeared that even this assumed jurisdiction was not sufficient to answer their purpose; for whenever a positive declaration of a use could not be proved, which must

(a) Just. Inst. lib. 2. tit. 23. s. 1.

(b) Just. Inst. lib. 2. tit. 23. s. 12.

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<sup>1</sup> For the origin and nature of Uses and Trusts, and their introduction into England, see Spence on the Equitable Jurisdiction of the Court of Chancery, Vol. I., part 2, book 3, ch. 2.

frequently have happened, when uses were declared in a secret manner, by words only, without writing, the Court of Chancery could not compel the feoffees to uses to execute them, there being *no legal proof* that they held the lands to the use of any other persons.

13. To remedy this inconvenience, John Waltham, Bishop of Salisbury, and Chancellor to King Richard II., took advantage of the privilege given him by the Statute of Westminster 2, 13 Edw. I. c. 34, of devising new writs; and invented a new writ of *subpœna*, returnable only into the Court of Chancery, which was used there for the same purpose as a citation in the courts of civil and canon law, to *compel the appearance* of a defendant, and to oblige him to *answer upon oath* the allegations of the plaintiff, contrary to one of the first principles of the common law, that no man can be compelled to charge himself.

14. It is well known how averse the English nation always \* was from any alteration of their ancient customs, \*334 and that they were particularly jealous of every maxim or rule taken from the civilians or canonists, which was attempted to be introduced or substituted in the room of the common law. Accordingly, we find that this innovation did not pass unnoticed. For early in the next reign,—namely, in 2 Hen. IV., the Commons took notice of this writ of *subpœna*, and presented a strong petition to the king against it, praying that it might be abolished; to which Henry, who was not then firmly settled on the throne, gave a palliating answer. (a)

15. Another petition was presented by the Commons to King Henry V., complaining of the hardships to which all persons were become liable, from the introduction of this new writ of *subpœna*; observing that it was a novelty, against the form of the common law, which John Waltham, late Bishop of Salisbury, out of his subtilty found out and begun, by which persons were compelled to answer upon oath, pursuant to the form of the civil law, and the law of the holy church; praying that those who sued out such a writ should insert in it all their allegations. And that if any person was aggrieved by a writ of this kind, in any matter which was determinable at common law, he should be paid the sum of £40. To this the king returned an answer in the negative; by which this writ of *subpœna* became firmly

(a) Rot. Parl. vol. 3. 471.

established; and was thenceforth constantly used for the purpose of compelling all persons to declare on oath whether they held particular lands to their own use, or to the use of others. (a)

16. From this account of the progress of uses, it evidently appears that the ecclesiastical chancellors adopted the principles of the civil law in the support of them; and that the Bishop of Salisbury derived the idea of the writ of *subpæna*, returnable into Chancery, from that law of Justinian, which has been mentioned in the preceding part of this chapter.

17. Notwithstanding the invention of the writ of *subpæna*, it appears that the Court of Chancery did not immediately possess itself of that absolute jurisdiction over persons enfeoffed to uses, which it afterwards exercised. For in the Rolls of Parliament, 9 Hen. V., there is a petition from William Lord Clynton, stating, that upon his going on an expedition to Ireland, he had enfeoffed William de la Poole of all his lands, for the performance of his will, which the said Poole refused to perform; and prayed  
335 \* remedy. \* When, upon full proof of the surmise aforesaid, it was enacted, Poole being present, that he should reënfeoff the said lord, or whom he would, and their heirs for ever, discharged of all incumbrances done by the said Poole; the which Poole did in open parliament, in two deeds, there enrolled. (b)

18. The abuses arising from the writ of *subpæna* were, in some degree, restrained by the Statute 15 Hen. VI. c. 4, which, after reciting,—“That divers persons had been greatly vexed and grieved by writs of *subpæna*, purchased for matters determinable by the common law of the land, to the great damage of such persons so vexed, and in subversion and impediment of the common law.” It was enacted that no writ of *subpæna* should be granted, until surety was found to satisfy the party so grieved, and vexed for his damages and expenses, if the matter could not be made good which was contained in the bill.

(a) Rot. Parl. vol. 4. 84.

(b) Rot. Parl. vol. 4. 151.



## CHAP. II.

## NATURE OF A USE BEFORE THE STATUTE 27 HEN. VIII.

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| <p>SECT. 1. <i>A Use was a Right in Conscience only.</i></p> <p>8. <i>Founded on Confidence in the Person.</i></p> <p>12. <i>And Privity of Estate.</i></p> <p>15. <i>Who might be seised to Uses.</i></p> <p>19. <i>What might be conveyed to Uses.</i></p> <p>20. <i>Rules by which Uses were governed.</i></p> <p>21. <i>Could not be raised without Consideration.</i></p> <p>22. <i>Not an object of Tenure.</i></p> <p>24. <i>Not subject to Forfeiture.</i></p> <p>26. <i>Not extendible, nor Assets.</i></p> <p>27. <i>Not subject to Curtesy or Dower.</i></p> | <p>SECT. 28. <i>Uses were alienable.</i></p> <p>32. <i>Without Words of Limitation.</i></p> <p>33. <i>Might commence in futuro.</i></p> <p>34. <i>Might be revoked.</i></p> <p>35. <i>And change by Matter subsequent.</i></p> <p>36. <i>Were devisable.</i></p> <p>38. <i>And descendible.</i></p> <p>40. <i>Inconveniences of Uses.</i></p> <p>41. <i>Statutes made to remedy them.</i></p> <p>45. <i>[Distinction between Uses and Trusts before the Stat. 27 Hen. VIII. c. 10.]</i></p> |
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SECTION 1. Lord Bacon, in his justly celebrated Reading on the Statute of Uses, observes, that it is the nature of all human science and knowledge to proceed most safely by negative and exclusive, to what is affirmative and inclusive; and then says,—“An use is no right, title, or interest in law.” Neither *jus in re*, nor *ad rem*, that is, neither an estate nor a demand; so that it was nothing for which a remedy was given by the course of the common law, being a species of property totally unknown to it, and for which it was, therefore, impossible that it should have made any provision. (a)

2. Lord Bacon then proceeds to state affirmatively *what a use is*; and after giving the *definition of a use* from Plowden, 352,—namely, that a use is a trust reposed by any person in the terre-tenant, that he may suffer him to take the profits, and that

(a) Bac. Read. 5, 1 Rep. 140. a,

337\* he \*will perform his intent, he says, *Usus est dominium fiduciarium*; use is an ownership in trust. So that *usus et status, sive possessio, potius differunt secundum rationem fori, quam secundum naturam rei*; for that one of them is in court of law, the other in court of conscience. (a)<sup>1</sup>

3. The reason why the *cestui que use* had no property whatever, by the common law, in the lands given to his use, was, because where lands were legally conveyed to one person to the use of another, the limitation of the use was deemed absolutely void; as it only derived its effect from the declaration of the feoffor; whereas no legal right to a freehold estate in lands could be transferred, without the ceremony of livery of seisin.

4. Thus, in a case mentioned in the Year Books, where A enfeoffed B to the use of himself, the judges observe, that in Chancery a man shall have his remedy according to conscience; but in the Common Pleas and the King's Bench it was otherwise; for the feoffee should have the land, and the feoffor should have nothing against his own feoffment, though it was only upon confidence. And it is said in Plowden, 349, that by the common law *cestui que use* could not enter upon the land; but if he had entered, the feoffees might have an action of trespass against him, and punish him; for the land as fully belonged to the feoffees, as if there had been no use of it; so that if the feoffees had ousted the *cestui que use*, or had sued him for taking the profits, he would not have any answer or defence at the common law, but was driven to seek his remedy in a court of conscience. (b)

5. Although the *cestui que use* was generally in possession of the lands, yet he was only considered, by the courts of common law, as tenant at sufferance; his title to the land was of so low and precarious a nature, that he could not even justify the seizing of cattle for trespass. And if he made a lease, the lessee might plead that he had nothing in the land. (c)

(a) (Bacon, Read. 9.)

(b) 4 Edw. 4. 3.

(c) 1 Rep. 140. a.

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<sup>1</sup> Chief Baron Gilbert describes an Use to be "where the legal estate of lands is in a certain person, and a trust is also reposed in him, and all persons claiming in privacy under him, concerning those lands, that some person shall take the profits, and be so seised or possessed of that legal estate, to make and execute estates according to the direction of the person or persons for whose benefit the trust was created." Gilb. on Uses, p. 1.

6. When the Court of Chancery first assumed a jurisdiction in cases of uses, it went no farther than to compel payment of the rents and profits to the *cestui que use*. In process of time it proceeded another step; and established it as a rule that the *cestui que use* had a right to call on the feoffees to uses for a conveyance of the legal estate to himself, or to any other person whom he chose to appoint; and also to compel him to \*defend the title to the land. Hence Lord Bacon has \*338 said that a use consists of three parts:—"The first, that the feoffee will suffer the feoffor to take the profits; the second, that the feoffee, upon the request of the feoffor, or notice of his will, will execute the estate to the feoffor or his heirs, or any other by his direction; the third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will reënter, or bring an action to recontinue the possession. So that these three, pernaney of the profits, execution of estates, and defence of the land, are the three points of a trust or use." (a)

7. As to the legal estate in the land, it was vested in the feoffee to uses, who performed the feudal services, and who was in every respect deemed to be the tenant of the fee; for it was liable to all his incumbrances; his widow was dowable of it; if he died, leaving an infant heir, the lord, as guardian to the infant, became entitled to hold the lands during the infancy; and if he was attainted of treason or felony, they were forfeited.

8. The right in conscience and equity to the rents and profits of land, which constituted a use, was not issuing out of the land, but was collateral thereto, and only annexed in privity to a particular estate in the land; that is, the use was not so attached to the land, that when once created it must still have existed, into whose hands soever the lands passed, as in the case of a rent, or right of common, but it was *created by a confidence in the original feoffee*; and continued to be annexed to the same estate, as long as that confidence subsisted, and the estate of the feoffees remained unaltered. So that to the execution of a use two things were absolutely necessary; namely, confidence in the person, and privity of estate. (b)

9. *Confidence in the person* signified the trust reposed in the feoffees, that arose from the notice given them of the use, and of

(a) Bac. Read. 10.

(b) 1 Rep. 122. u. Plowd. 352. Poph. 71.

the persons who were intended to be benefited by the feoffment; which was sometimes expressed, and sometimes implied. Thus if a feoffee to uses enfeoffed another person of the land, who had notice of the uses to which such land was liable, the new feoffee took it under an implied confidence, and was compellable to execute the use. For it was resolved that whenever there were feoffees to a use, their heirs and feoffees, and all who came into the land under them, in the *per*, without consideration, and with

notice of the use, should be seised to such use, and be  
339 \* compelled \* in chancery to execute it. But if a feoffee to uses enfeoffed a stranger of the land, for valuable consideration, and without notice of the use, as in that case, there was no confidence in the person, either express or implied, the use was destroyed; and the new feoffee could not be compelled to execute it. (a)

10. If, however, a *stranger purchased* lands from a feoffee to uses, for a valuable consideration, *with notice* of the uses to which the lands had been conveyed, he would, in that case, be compelled to perform them. For although the consideration implied a seisin to his own use, yet the notice of the former uses was a circumstance which, in the Court of Chancery, would render him liable to the performance of them. (b)<sup>1</sup>

11. The doctrine of confidence in the person was at first extremely limited, as it only extended to the original feoffee; for Lord Bacon says, the judges, in 8 Edw. IV., were of opinion that a *subpœna* did not lie against the heir of the feoffee, who was in by law, but that the *cestui que use* was driven to his bill in parliament. It appears, however, to have been settled in the reign of King Henry VI. that a *subpœna* would lie against all those who came in in the *per*, without paying a valuable consideration, and also against all those who had notice of the former uses; although they did pay a valuable consideration. (c)

(a) Bro. Ab. tit. Feoff. Al. Use, pl. 10. 1 Rep. 122. b. Gilb. Uses, 178.

(b) 1 Rep. 122. b. Gilb. Uses, 179.

(c) Bac. Read. 23. Kellw. 42.

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1 See Story on Equity Jurisp. Vol. I. § 395, Vol. II. § 1257; 4 Kent, Comm. 307; 1 Fonbl. Eq. book 2, ch. 6, § 2; Murray v. Ballou, 1 Johns. Ch. 566; Dunlap v. Stetson, 4 Mason, 349; Saunders v. Dehew, 2 Vern. 271; Adair v. Shaw, 1 Sch. & Lefr. 262, per Ld. Redesdale; Wilson v. Mason, 1 Cranch. 100, per Marshall, C. J.; Thompson v. Wheatley, 5 Sm. & Marsh. 499; Harrisburg Bank v. Tyler, 3 Watts & Serg. 373; Lee v. Tiernan, Addis. R. 348.

12. With respect to privity of estate, it is to be observed that a use was a thing collateral to the land, and only *annexed to a particular estate* in the land, *not to the mere possession* thereof; so that whenever that particular estate in the land to which the use was originally annexed was destroyed, the use itself was destroyed. Thus where a person came into *the same estate* whereof the feoffee to uses was seised,<sup>1</sup> such person was liable to the performance of the uses. But if he came in of any *other estate* than that whereof the feoffee to uses were seised,<sup>2</sup> even with full notice of the use; yet as the privity of estate was thereby destroyed, the lands were no longer liable to the uses. (a)

13. It followed from these principles that where a feoffee to uses was disseised, the *disseisor* could not be compelled in chancery to execute the use, because the privity of estate was destroyed. For the disseisor came in in the *post*, that is, he did not claim by or from the feoffee to uses, but came in of an estate paramount to that of such feoffee. Whereas if a person was \*disseised of lands which were liable to a rent, right \*340 of common, or other charge of that kind, the lands would still continue subject to those charges, notwithstanding the disseisin; because they were annexed to the possession of the land. (b)

14. In the same manner where a feoffee to uses died without heirs, or committed a forfeiture, or married; neither the lord who entered for his escheat or forfeiture, nor the husband claiming the lands as tenant by the curtesy, nor the wife who was assigned dower, were subject to the uses, because they were not in in the *per*; that is, in privity of the estate to which the use was annexed, but claimed an interest paramount to it. (c)

15. With respect to the persons who were capable of being feoffees to uses, *all private persons* whom the common law enabled to take lands by feoffment, might be *seised to a use*; and were compellable in chancery to execute it. Thus Lord Bacon says,—“A feme covert, and an infant, though under the years of discretion, may be seised to a use. For as well as land might descend to them from a feoffee to use, so might they originally

(a) 1 Rep. 139. b.

(b) 1 Rep. 139. b. 122. b.

(c) 1 Rep. 122. a.

<sup>1</sup> As, for example, by purchase or descent from him.<sup>2</sup> Namely, by paramount title, or by disseisin.

be enfeoffed to a use." But a corporate body could not be seised to a use;<sup>1</sup> because the Court of Chancery could not issue any process against them for the execution of it. And a corporation could not be intended to be seised to any other's use. (a)

16. Neither the king, nor a queen regnant, on account of their royal capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the use; as no process could be awarded against them by the Court of Chancery. (b)

17. When King Richard III. was Duke of Gloucester, he had been frequently made feoffee to uses, so that upon his accession

(a) Bac. Read. 58. Plowd. 102.

(b) Year Book, 7 Edw. 4. 17.

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<sup>1</sup> Three reasons have been assigned for this disability; namely, that a corporation, by its very nature, is not subject to any personal process of Chancery to compel the execution of the use or confidence; that it cannot execute any use for others without wronging the founder, its capacity being created for a specific purpose or use certain; and that the Statute of Uses, where it speaks of the feoffee, employs only the word *person*; whereas, when it speaks of the *cestui que use*, it says, *person or body politic*. See Bacon on Uses, by Rowe, p. 57; Ibid. p. 42, and note (66); Gilbert on Uses, by Sugden, p. 5, n. 1; Cornish on Uses, p. 128; Sanders on Uses, &c., Vol. II. p. 27, note (4), 5th ed.; 2 Preston on Convey. p. 254. These reasons, however, have not been deemed entirely satisfactory in England; and the doctrine has been found inconvenient, as it goes to prevent a corporation from conveying by deed of bargain and sale, or by any other instrument, deriving its effect from the Statute of Uses. To avoid this inconvenience, and to enable corporations to convey in those modes, a distinction has been taken between standing seised to an use, and giving an use; it being held that a corporation may well convey by way of use, though it cannot take, or stand permanently seised, to the use of others. *Holland v. Bonis*, 2 Leon. 121, 3 Leon. 175; 2 Com. Dig. tit. Bargain and Sale, b. 3. But the authors above cited, as well as other jurists, plainly regard this distinction as a refinement not fit to be followed in judicial decisions; and the rule itself is now defended in England rather upon the ground of authority than of principle. In the United States, neither of the reasons originally given for the rule, have any application; for corporations are subject to the process of Chancery, the answer and discovery being made by their officers; Story on Eq. Plead. § 235; and obedience being enforced by distringas, sequestration, and injunction, the execution of an use can work no injury to the designs of the founder, whatever may be said of certain trusts, foreign to the purposes of the corporation; and as to the word *person*, in the statute, it is now generally, and perhaps universally, held, to apply as well to bodies corporate as to individuals. *United States v. Amedy*, 11 Wheat. 392; *Planters' and Merch. Bank v. Andrews*, 8 Port. 404. And see *Louisville Railroad Co. v. Letson*, 2 How. S. C. R. 497. It is, therefore, the rule of American law, that corporations may be seised to any use or trust, not foreign to the purposes of their creation. 2 Kent, Comm. 279, 280; Angell & Ames on Corporations, ch. 5, p. 100—105, 153, 154, 2d ed. See *post*, tit. 12, ch. 1. [So may voluntary, unincorporated associations, that are capable of being designated, identified and ascertained by legal proof. *Tucker v. Seaman's Aid Society*, 7 Met. 188; *Washburn v. Sewall*, 9 Ib. 280; *Earle v. Wood*, 8 Cush. 430; *King v. Parker*, 9 Ib. 71; *Post*, ch. 3, § 22, note, p. \*354.]

to the throne, he would have been entitled to hold the lands so conveyed to him, discharged of the uses. To obviate so notorious an injustice, an act of parliament was immediately passed, by which it was enacted that where the king had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees, as if he had never been named. And that where the king stood solely enfeoffed to uses, the estate should vest in the *cestui que use* in like manner as he had the use. (a)

18. A queen consort could not be seised to a use; for although she was enabled to grant and purchase without the \*king, yet in regard of the government and interest \*341 which the king had in her possessions, she could not be seised to a use. (b)

19. With respect to the *species of property* which might be conveyed to uses, it was held that nothing whereof the use was inseparable from the possession, such as annuities, ways, commons, &c., *quæ ipso usu consumuntur*, could be granted to a use. But that *all corporeal inheritances*, as also *incorporeal hereditaments*, which were in *esse*, as rents, advowsons in gross, local liberties, and franchises, might be conveyed to uses. (c)

20. A use being a species of property totally unknown to the common law, and owing its existence to the equitable jurisdiction of the Court of Chancery, the rules by which uses were governed were derived from the civil law;<sup>1</sup> and differed materially from those by which real property was regulated in the courts of common law. Hence Lord Bacon has observed, that uses stood upon their own reasons, utterly differing from cases of possession. (d)

21. By the common law, a feoffment of land was good without any consideration. But Lord Bacon says it was established in Chancery, that a use could *not* be raised *without a sufficient consideration*; a doctrine evidently taken from the maxim of the civil law, *ex nudo pacto non oritur actio*. In consequence of which the Court of Chancery would not compel the execution

(a) Stat. 1 Rich. 3. c. 5.

(b) Bac. Read. 57.

(c) W. Jones, 127.

(d) Bac. Read. 13.

<sup>1</sup> Though the Roman jurisprudence may be regarded as the source of Equity Jurisdiction, yet what was there found was largely extended and improved upon by the clerical chancellors and their successors. See Spence on the Equitable Jurisdiction of Chancery, Vol. I. p. 435.

of a use, unless it had been raised for a good or a valuable consideration; as that would be to enforce a *donum gratuitum*. (a)

22. A use not being considered as an estate in the land, was *not an object of tenure*; and was, therefore, exempt from all those oppressive burdens which were introduced into England by the Normans, as consequences of the feudal system. Thus if a *cestui que use* died, leaving a son, or a daughter, within age, the lord had not the wardship or marriage of the heir, or a relief on the death of the ancestor; nor could he claim the lands as an escheat, on the death of the *cestui que use* without heirs. (b)

23. After the ecclesiastics had been restrained by the Stat. 15 Rich. II. c. 5, from acquiring the use of lands, it might be supposed that the practice of conveying lands to uses would have ceased. But it was soon found that this was the most effectual mode of evading the hardships of the feudal tenures.

342\* \*24. Where a *cestui que use* was attainted of treason or felony, the *use was not forfeited*, either to the king, or to the lord of the fee; because a use was not held of any person. So that during the contests between the houses of York and Lancaster, as it was the constant practice to attain the vanquished, almost all the lands of the nobility were conveyed to uses. (c)

25. In some general acts of parliament relating to treason, as that of 21 Rich. II. c. 3,<sup>1</sup> and in most particular acts of attainder passed after that time, there was a special provision made, that the persons attainted should forfeit all lands whereof they, or any to their use, were seised. And in most of those acts provision was also made to save from forfeiture such lands whereof the persons attainted were seised, to the use of others.

26. A *use was not extendible*, because there was no process at common law, but against legal estates; for uses were mere creatures of equity; so that many persons conveyed their lands to uses for the purpose of defrauding their creditors. And as a



(a) Bac. Read. 13. (8 Mass. R. 441.)

(b) 1 Inst. 76. b.

(c) 1 Inst. 272. a.

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<sup>1</sup> This statute, and all others enacted in the same parliament, were repealed by St. 1 H. 4, c. 3, as having been made by threats and constraint of the king. 1 Hal. P. C. 86; Keble's Statutes, p. 188.



use was neither a chattel nor an hereditament, it was *not assets* to executors, or to the heir. (a)

27. Another circumstance attending a use was, that the *husband or wife* of a *cestui que use* could *neither acquire an estate by the curtesy or in dower in the use*; because the *cestui que use* had no legal seisin of the land.<sup>1</sup> This was a grievance much complained of, particularly as to dower; and, therefore, it became customary, when most estates in the kingdom were vested in feoffees to uses, to settle some estates, before marriage, on the husband and wife for their lives; which, as we have seen, gave rise to the modern jointure. (b)

28. Although a use was but a right, and could only be considered as a chose in action; which, according to the principles of the common law, is neither transferable nor assignable, yet *a use might be aliened*. And Lord Bacon mentions two adjudged cases in which a right to a use was allowed to be transferred; for as no action at law could arise from such a transfer, there was no danger of maintenance. (c)

29. A use might be transferred by one person to another, *by any species of deed or writing*. And, from its nature, it was impossible that it could be the subject of a feoffment, with livery of seisin.<sup>2</sup>

30. Lord Bacon says there is no case at common law, where a \*person can take under a deed, unless he is a \*343 party to it. Whereas a *use might be declared to a person*

(a) 1 Rep. 121. b. 1 Inst. 374. b.

(b) Perk. s. 457. Tit. 5 & 6. Tit. 7 c. 1.

(c) Bac. Read. 16.

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<sup>1</sup> And because no trust was declared for *their* benefit, at the creation of the estate. 2 Bl. Comm. 331; Cornish on Uses, p. 20.

<sup>2</sup> An use might have been raised, at common law, by parol, upon a feoffment, because the legal estate might so pass,—namely, by a transfer of possession *en pais*. But since a deed has become necessary, by statute, to pass the estate, a deed, or at least a writing, is necessary to declare an use. Gilb. on Uses, p. 270, 271; 2 Story on Eq. Jurisp. § 235; Claiborne v. Henderson, 3 Hen. & Munf. 340, 354. Where the *bonâ fide* possessor of lands, under a defective title, he having no notice of the defect, has made permanent and beneficial *improvements* upon the estate, the value of which he is entitled, in Equity, to recover of the true owner, he may convey this equitable right or interest by parol, accompanied by an *actual* transfer of the possession to the purchaser. Lombard v. Ruggles, 9 Greenl. 62. And see Bright v. Boyd, 1 Story, R. 478; 2 Greenl. on Evid. § 549; Benedict v. Bebee, 11 Johns. 145. But a *contract to transfer* the possession must be in writing. Howard v. Easton, 7 Johns. 205.

who was *not a party* to the deed by which the use was raised ; because a conveyance to a use was nothing but a publication of a trust. (a)

31. It frequently happened that *cestui que use* being in possession, aliened the lands, and afterwards the feoffees entered, which gave rise to several vexatious suits in Chancery. To remedy this inconvenience, the Statute 1 Rich. III. c. 1, gave the *cestui que use* in possession a power of alienating the legal estate, without the consent or concurrence of the feoffees.<sup>1</sup>

32. In the alienation of uses, *none of those technical words* which the law requires in the limitation of particular estates *were deemed necessary*. Thus a use might be limited in *fee simple*, without the word *heirs* ; for if a sufficient consideration was given, the Court of Chancery would decree the absolute property of the use to be well vested in the purchaser. And as a use was a thing which consisted merely in confidence and privity, and was not held by any tenure, the rules of the common law were not violated.

33. If an estate had been limited at common law to a man, and to such woman as he should afterwards marry, the man would have taken the whole, and the limitation to the woman would have been void ; because a freehold could not be created *to commence in futuro* ; but the limitation of a *use* in this manner would have been *good*. So if a man had made a feoffment to the use of one for years, and after to the use of the right heirs of J. S., this limitation had been good, for the feoffees remained tenants of the freehold. (b)

34. It was determined, upon the same principles, that a *power of revocation* might be annexed to the limitation of a use ; by which means the grantor might, at any future time, revoke the uses he had declared, and limit new uses to other persons ; which the feoffee to uses was bound to execute.

(a) Bac. Read. 14. Tit. 32. c. 2.

(b) 1 Rep. 101. a. Jenk. Cent. 8. ca. 52. 1 Rep. 135. a. Tit. 16. c. 4.

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<sup>1</sup> This statute was never adopted in *Maryland* ; *Matthews v. Ward*, 10 G. & J. 443 ; and is not known to have been recognized as common law in any other of the United States. The Statutes of Uses, see *post*, ch. 3, § 3, *note*, provided a remedy for most of the mischiefs which this act was designed to prevent ; and special trusts, which are not within its operation, have, in most of the States, been the subject of particular legislation. See *post*, tit. 12, ch. 2, § 7.

35. A *use might be limited* in such a manner as to *change from one person to another*, upon the happening of some future event. Thus a use might be limited to A and his heirs, until B should pay him £40; and upon payment of that sum, the use should change and vest in B and his heirs. For though the rules of the common law did not allow any estate to be limited after an estate in fee simple, yet the Court of Chancery admitted \*this species of limitation to be good in the \*344 case of a use. Because, as Lord Bacon observes,—  
 “Things may be avoided and determined by the ceremonies and acts like unto those by which they are created and raised; that which passeth by livery, ought to be avoided by entry; that which passeth by grant, by claim; that which passeth by way of charge, determineth by way of discharge. And so a use, which is raised but by declaration or limitation, may cease by words of declaration or limitation; as the civil law saith, *in his magis consentaneum est ut iisdem modis res dissolvantur quibus constituentur.* (a)

36. *Uses were divisible*, though at that time lands were not.<sup>1</sup> And Lord Bacon observes, that one of the reasons why so much land was conveyed to uses was, because persons acquired, by that means, a power of disposing of their real property by will, which enabled them to make a much better provision for their families than they could otherwise have done. (b)

37. One of the first cases in the Year Books, respecting uses, was this:—A woman who had made a feoffment to uses afterwards married, and by her will directed that her feoffees should convey the legal estate to her husband. It was adjudged that the will was void at law, being made by a feme covert; and, therefore, should also be void in Chancery. (c)

38. *Uses were descendible* in the same manner as legal estates. And this was the only instance in which the Court of Chancery, in cases of uses, followed the rules of the common law. For the doctrine of the half-blood was allowed to take place in the descent of uses. And even local customs were left unviolated in this instance. So that where a *cestui que use* of lands held in

(a) Bro. Ab. Feoff. al. Use, 30. Bac. Read. 18.

(b) Bac. Read. 20. 1 Rep. 123. b.

(c) Mich. 18. Edw. 4. 11. b.

<sup>1</sup> But see 1 Spence on Equit. Jurisd. p. 20.

gavelkind or borough English died, leaving several sons, the use descended either to all of them, or to the youngest, according to the custom. (a)

39. It was held, upon the same principle, that if lands descended on the part of the mother, and the person in possession made a feoffment to uses, the use should descend to the heirs on the part of the mother, because the legal estate would have gone to them. (b)

40. Thus stood the doctrine of uses, as regulated and settled by the Court of Chancery; and in this state it was, in some instances, applied to very useful purposes, by removing the restraints on alienation, and enabling the proprietors of real  
345 \* \* property to exercise several powers over it, which were not allowed by the rules of the common law. But uses became so general, and were applied to such bad purposes, that at length they were *productive of very great grievances*. Feoffments to uses were usually made in a secret manner, so that where a person had cause to sue for land, he could not find out the legal tenant, against whom he was to bring his *præcipe*. Husbands were deprived of their estates by the curtesy, and widows of their dower; creditors were defrauded; the king, and the other feudal lords, lost the profits of their tenures, their wardships, marriages, and reliefs, and an universal obscurity and confusion of titles prevailed, by which means purchases for valuable consideration were frequently defeated.

41. As a remedy for these inconveniences, *several statutes* were made to subject uses to the same rules as legal estates. By the Stat. 50 Edw. III., it was enacted, that where persons conveyed their tenements to their friends by collusion, to have the profits at their will, their creditors should have execution of such tenements, as if no such gifts had been made. By the Stat. 1 Rich. II. c. 9, a feoffment of lands for maintenance was declared to be void, and an assize maintainable against the pernor of the profits of lands. And by 2 Rich. II. St. 2, c. 3, fraudulent deeds, made by debtors to avoid their creditors, are declared void.

42. By the Stat. 1 Hen. VII. c. 4, reciting that divers of the king's subjects, having cause of action by *formedon*, &c., were

(a) 1 Inst. 14 b.

(b) Gilb. Uses, 17. Tit. 29. c. 3.

defrauded and delayed of their said actions, and oftentimes without remedy, because of feoffments made of the same lands and tenements to persons unknown, &c.; it was enacted that the demandant, in every such case, should have his action against the pernor or pernors of the profits of the lands and tenements demanded, whereof any person or persons had been enfeoffed to his or their use.

43. By the Statute 4 Hen. VII. c. 17, it was enacted, that if any person or persons should be seised of any estate of inheritance, being tenant immediate to the lords of any castles, &c., holden by knight-service, to the use of any other person or persons, and of his heirs only, and he to whose use he or they were so seised dieth, his heir being within age, no will by him declared, nor made in his life touching the premises; the lord of whom such castles, &c., were holden immediately, should have a writ of right \* of ward, as well for the body as \* 346 for the land, as the lord should have had if the same ancestor had been in possession of the estate, so being in use at the time of his death, and no such estate to his use made; and that if any such heir was of full age at the death of his ancestor, to pay relief as his ancestor, whose heir he was, would have paid if he had been in possession of that estate, so being in use at the time of his death, and no such estate to his use made or had.

44. By the Statute 19 Hen. VII. c. 15, it was enacted, that it should be lawful for every sheriff, or other officer to whom any writ or precept should be directed, at the suit of any person or persons, to have execution of any lands, tenements, or other hereditaments, against any person or persons, upon any condemnation, statute merchant, &c., to make and deliver execution unto the party in that behalf suing, of all such lands and tenements as any other person or persons were in any manner seised, to the only use of him against whom execution was so sued.

45. [*Before the Statute of the 27 Hen. VIII. c. 10, it seems a distinction was established between uses, the nature and properties of which have been considered in the preceding chapters of the present title, and trusts.* Sir Francis Bacon says, where the trust is not special nor transitory, but general and permanent, there it is a "use." Thus where feoffor enfeoffs feoffee in fee, upon a trust or confidence, that he would permit the feoffor and

his heirs to take the rents and profits, or to make such conveyances of the legal estate as he or they should direct. But where the trust was special or transitory, it was not in strictness a use, but a trust. Thus, where the feoffor enfeoffs the feoffee in fee, to the intent to reënfeoff him, or to be vouched, or to suffer a recovery, this, Bacon denominates the special trust lawful.] (a) †

(a) Bac. Uses, 8. 2 Salk. 676.

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[ † For a more detailed consideration of the above distinction and its consequences, see Sanders' Uses, Vol. I. ch. 1, s. 2.]

## CHAP. III.

## STATUTE 27 HEN. VIII. OF USES.

SECT. 1. *Statement of the Statute.*5. *Circumstances necessary to its Operation.*6. I. *A Person seised to a Use.*7. *What Persons may be seised to Uses.*11. *Of what Estates.*12. *Estates Tail.*16. *Estates for Life.*SECT. 19. *What may be conveyed to Uses.*22. II. *A Cestui que Use in esse.*25. *In what Case the Statute operates.*32. III. *A Use in esse.*34. *The Statute then transfers the Possession.*36. *Saving of all former Estates.*

SECTION 1. Notwithstanding the variety of statutes by which it was endeavored to render uses subject to the rules of the common law, means were found of evading them, particularly as to the feudal profits upon marriages, wardships, and reliefs; for in the Stat. 4 Hen. VII., for enabling lords to have the wardship of persons entitled to a use only, an exception was inserted, that it should not take place where the ancestor had made a will, of which many persons took advantage, to the great detriment of the king and the great nobility. (a)

2. It is mentioned in Burnet's History of the Reformation, and also by Mr. Justice Harper, that King Henry VIII., in the 23d year of his reign, caused a bill to be brought into parliament to remedy the abuses that arose from the universal practice which then prevailed, of making feoffments to uses, which was rejected by the Commons. But four years after, parliament passed the Stat. 27 Hen. VIII. c. 10, intituled, "An Act concerning Uses and Wills," usually called, *The Statute of Uses*; reciting that by the common law, lands were not devisable by will, nor ought to be transferred but by livery of seisin; yet, nevertheless, divers \*and sundry imaginations, subtle inventions and practices, \* 348 had been used, whereby the hereditaments of the realm had been conveyed by fraudulent feoffments, fines, recoveries,

(a) *Ante*, c. 2. s. 43.

and other assurances; and also by wills and testaments; by reason whereof heirs had been unjustly disinherited; the lords had lost their wards, marriages, reliefs, heriots, escheats, aids, &c.; married men had lost their tenancies by the curtesy; widows their dower; and manifest perjuries were committed. (a)

3. It is, therefore, enacted, (s. 1,) "That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner or means, whatever it be; that in every such case, all and every such person and persons and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence, or trust, in remainder or reversion, shall from henceforth stand and be seised, deemed and adjudged, in lawful seisin, estate, and possession of and in the same honors, castles, &c., to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons, that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust, after such quality, manner, form, and condition, as they had before, in or to the use, confidence, or trust that was in them.

(§ 2.) "That where divers and many persons be or hereafter shall happen to be jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seised;<sup>1</sup>

(a) Burnet, Hist. Reform. vol. 1. 116. 2 Leon. 16.

<sup>1</sup> This provision was inserted to meet the case then very common, where the owner himself was one of the feoffees; a practice deemed not inconvenient; it being held, that, though the use was thereby in part suspended, yet it might be disposed of in the same manner as if the entire legal estate was vested in others. 1 Sugd. on Powers, p. 4.



that in every such case, those person or persons which have or hereafter shall have any such use, confidence, or trust in any such lands, &c., shall from henceforth have, and be deemed and adjudged to \*have, only to him or them that \*349 have or hereafter shall have any such use, confidence, or trust, such estate, possession, and seisin of and in the same lands, &c., in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments.”<sup>1</sup>

<sup>1</sup> The doctrine of the Statute of Uses, 27 Hen. 3, ch. 10, has been very generally recognized in the jurisprudence of the United States. 4 Kent, Comm. 299. See also *Chamberlain v. Crane*, 1 N. Hamp. 64; *Exeter v. Odiorne*, Ibid. 237; *French v. French*, 3 N. Hamp. 239; *Marshall v. Fisk*, 6 Mass. 31; *Calvert v. Eden*, 2 Har. & McH. 284; *Bryan v. Bradley*, 12 Conn. 474; Report of the Judges, 3 Binn. 619. In *Ohio*, the Statute of Uses seems never to have been in force; and uses stand as they were before the 27 Hen. 3. *Thompson v. Gibson*, 2 Ohio R. 439; *Helfeinstine v. Garrard*, 7 Ohio R. 275; Walker, Introd. p. 309, 310. In *South Carolina*, the statute is expressly adopted in terms. So. Car. Stats. at Large, Vol. II. p. 467. In *Indiana*, *Illinois*, and *Missouri*, it is reenacted in substance. Ind. Rev. St. 1843, p. 447, § 181; Ill. Rev. St. 1839, p. 148; Missouri, Rev. St. 1845, ch. 32, § 1, p. 218. In *Delaware*, it is briefly enacted, that “lands, tenements, and hereditaments may be aliened and possession thereof transferred, by deed, without livery of seisin; and the legal estate shall accompany the use and pass with it.” Del. Rev. St. 1829, p. 89, § 1. [This statute has never been in force in Vermont. *Gorham v. Daniels*, 23 Vt. (8 Washb.) 600.]

In *Virginia*, the Statute of Uses was part of the colonial law of the State, until the general repeal of all British statutes in 1792. Afterwards a partial substitute was adopted, by the Statute of Conveyances of Feb. 24, 1819, § 29, Rev. Code, Vol. I. p. 370, by which the possession is transferred to the use, only in the cases of deeds of bargain and sale, lease and release, covenants to stand seised to uses, and deeds operating by way of covenants to stand seised to uses. A similar enactment is found in the statutes of *North Carolina*, Rev. St. 1836, Vol. I. ch. 43, § 4, p. 259; of *Kentucky*, Rev. St. 1834, Vol. I. p. 443, § 12; of *Mississippi*, How. & Hutch. Dig. p. 349, ch. 34, § 28; and of *Florida*, Thompson’s Dig. p. 178, § 4.

Upon this statute, Mr. Lomax has the following observations:—“To give to the words of this act a meaning co-extensive with the English statute, so as to include every case where there may be found a seisin in one person and a use in another, seems to be unwarranted by any rule of statutory interpretation, nor is there apparent any principle of policy so imperious as to require so free a construction of plain, unambiguous language.

“Of the three cases which are specified in the act, in which the law operates to execute the seisin to the use, two of them are plainly cases where there is a declaration of use without transmutation of possession, viz., bargains and sale, and covenants to stand seised. In the other case of the lease and release, it is the release which is the operative part of the conveyance; and was at common law entirely effectual to enlarge the estate and possession of the lessee into the measure of the freehold released. The act of the legislature could give no additional efficacy to the release; and it is presumed that it was for no such purpose that the lease and release was enumerated with the

4. It is evident from the words of this statute, that the *intention of the legislature* was entirely to abolish uses, by destroying the estate of the feoffees to uses, and transferring it from them

other two assurances. The purpose of the legislature was doubtless, in contemplation of the lease alone, to make that effectual, as it had been under the Statute of Henry 8, by virtue of the consideration for raising a use, although there had been no actual entry. It is true that that purpose seems to have been unnecessary, and that it was supererogation to have made any provision in regard to the lease, which is usually created by deed of bargain and sale for one year, and that, therefore, the provision transferring the possession to the bargainee included the provision for the transfer of the possession to the lessee. The legislature may, however, have intended a rule applicable to every demise, whether by bargain and sale or by a common law lease, or by any other species of assurance, so that, if, followed by a release, the lessee, whether he had entered or not, should be invested with the possession as effectually as if enfeoffed with livery of seisin. If this be the correct explanation of our statute, its provisions are only intended to apply to cases where uses are created without transmutation of possession, and seems purposely to have refrained from all that class of cases where there has been a transmutation of possession. According to what appears to be the reasonable construction of the act, the legislature intended, at least in the case of the bargain and sale, and the lease and release, without any reference to the *modus operandi*, that the bargainee and releasee should have a statutory possession of the land, that assurances so framed should operate as grants. It seems only in the case of the covenant to stand seised, (if the words in one part of the clause are to have the appropriate application demanded by words in another part,) that any reference is made to the doctrine of uses, as furnishing any rule or principle by which the assurance is to have its operation.

"It has been said in the Court of Appeals, that 'we have no general Statute of Uses;' and it was held that where a use was devised in land, the seisin was not executed to the use, because devises were not among the conveyances enumerated in the act. *Bass v. Scott*, 2 Leigh. 359, per Cabell, J.

"Except, therefore, in the cases of bargains and sales, lease and release, and covenant to stand seised to uses, it seems that all other uses are to be regarded as unexecuted, as they were prior to the Statute of Henry 8. These unexecuted uses will comprehend such as are raised by feoffments to uses, releases, and other conveyances operating by transmutation of possession, devises, resulting uses, and uses by implication.

"In all these cases, the uses will, consequently, remain as equitable estates, of the same nature as trusts, and not cognizable in courts of law." 1 Lomax, Dig. p. 188, 189.

In *New York*, it is declared in the Revised Statutes, Vol. II. p. 13, 3d ed., part 2, ch. 1, art. 2, that uses and trusts, except as by that article authorized and modified, were abolished; and every estate and interest in land is declared to be a legal right, cognizable as such in the courts of law, except as therein otherwise provided; and every estate, then held as a use executed under any former statute, is confirmed as a legal estate. And every person, entitled to the actual possession of lands and the receipt of the rents and profits thereof, in law or equity, by virtue of any grant, assignment, or devise, is declared to have the legal estate therein, commensurate with his beneficial interest. On this statute, Chancellor Kent has remarked, that the word *assignment* was introduced to

to the *cestui que use*, by which means the use should be changed into a legal estate; and the statute has so far answered the intention of the makers of it, that no use, upon which the statute operates, can exist in its former state for more than an instant; as the legal seisin and possession of the land must become united to it, immediately upon its creation; so that where this statute operated, lands conveyed to uses could never, in future, become liable to the charges or incumbrances of the feoffees; but, on the other hand, would be always subject to the charges and incumbrances of the *cestui que use*, and to all the rules of the common law. Thus they ceased to be devisable; and by that means the great object of King Henry VIII. was attained, which was to preserve his right to wardship, and other feudal profits, out of the lands of the nobility. (a)

5. There are *three circumstances* necessary to the execution of a use under this statute. 1. A *person seised* to the use of some other person. 2. A *cestui que use in esse*. And 3. A *use in esse*, in possession, remainder, or reversion. (b)

6. With respect to the first of these circumstances, the words of the statute expressly require it; for these are,—“Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honors, &c., to the use, confidence, or trust of any other person or persons.” It will, therefore, be necessary in this place to inquire—first, what persons are capable of being seised to uses; and, secondly, of what estate or interest they can be so seised.

7. All those who were *capable* of being seised to uses *before the statute* may still be seised to a use. On the other side, all those who were incapable of being seised to uses before the statute still labor under the same incapacity. (c)

(a) 2 Leon. 17. (1 Atk. 592.)

(b) (Chudleigh's case, 1 Rep. 126. a.)

(c) (*Ante*, ch. 2. § 12, 13.)

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make the assignment of terms, and other chattel interests, pass the legal interest in them, as well as in freehold estates; though the use in chattel interests was not executed by the English Statute of Uses. 4 Kent, Comm. 300.

As the estate is thus executed in the *cestui que use*, and an interest in lands cannot now be conveyed but by deed, it follows that a deed is necessary to transfer the interest of the *cestui que use* to a stranger. *Northampton Bank v. Whiting*, 12 Mass. 104.

8. It has been stated that neither the king nor the  
 350 \* queen \* could, before the statute, have been seised to a  
 use, or, rather, were not compellable to execute the use.  
 This law continued after the statute; and a singular case arose  
 in 35 Eliz., respecting the prerogative of the crown to hold lands  
 discharged of all uses.

9. A committed high treason in 18 Eliz., for which he was  
 attainted in 26 Eliz. Between the treason and the attainder, a  
 fine was levied to him by B of certain land, to the use of B  
 and his wife, (who was sister to A,) and of the heirs of the said  
 B. Afterwards B bargained and sold the lands to J. S. for money.  
 Upon discovery of the treason and the attainder of A, the pur-  
 chaser was advised by Plowden, Popham, and many others,  
 that the land was in the queen; because the queen was entitled  
 to all the lands that traitors had, at the time of the treason, or  
 after; so the use which was declared to B and his wife upon the  
 fine was void, by the relation of the right of the queen under the  
 attainder; and the queen must hold the land, discharged of the  
 use; because she could not be seised to a use. It is but justice  
 to mention, that the case being represented to Queen Elizabeth,  
 she granted the land to the *cestui que use*. (a)

10. By the words of the statute, which are, "any person or  
 persons," aliens and corporations are excluded from being seised  
 to a use.' It was, therefore, determined, in a case reported by  
 Dyer, that where an alien and a natural-born subject were en-  
 feoffed to uses, the moiety of the alien should, upon office found,  
 (but not before,) become vested in the crown. (b)

11. With respect to the *estate or interest* of which a person  
 may be seised to a use, the words of the statute are,—“Where  
 any person or persons stand or be seised, or at any time here-  
 after shall happen to be seised.” Now, the word *seised* extends  
 to every species of *freehold estates*; although it appears to have

(a) Pimble's case, Moo. 196. 1 Inst. 13. a. n. 7.

(b) Bac. Read. 42—57. King v. Boys, Dyer, 283. (Ferguson v. Franklin, 6 Munf. 305.  
 Cornish on Uses, 141.)

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<sup>1</sup> In the United States, the word “*person*,” in statutes, is held to apply as well to  
 bodies corporate as to individuals; U. States v. Amedy, 41 Wheat. 392; and, there-  
 fore, a corporation may be seised to any use or trust, not foreign to the purposes of its  
 creation. See *ante*, ch. 2, § 15, note.

As to the capacity of aliens to take and hold lands, see *ante*, tit. 1, § 39, note.

been the general opinion, before and immediately after the passing of this statute, that all feoffees to uses must have been seised in fee simple.

12. It was, therefore, much doubted whether a *tenant in tail* could be seised to a use. Jenkins states it as a point determined by all the judges, that a tenant in tail could not be seised to a use, either expressed or implied. 1. (Not to an implied use;) because the tenure creates a consideration. 2. (Nor to an expressed use;) because the Statute *De Donis* has so appropriated and fixed the estate tail to the donee, and the \*heirs \*351 of his body, that neither he nor they can execute the use.

Hence Lord Coke has said, that if an estate was made to a man and the heirs of his body, either to the use of another and his heirs, or the use of himself and his heirs, this limitation of use was utterly void. (a)<sup>1</sup>

13. The case upon which Lord Coke and Jenkins founded their opinion, is that of *Cooper v. Franklin*, which arose in 12 Jac. I.<sup>†</sup> But if this case be considered as an authority, it will

(a) Jenk. Cent. 5 Ca. 1. 1 Inst. 19. b.

<sup>1</sup> For it was said that if the tenant in tail should execute the use, the issue in tail might recover the land back, *per formam doni*; and that the words, *to use of heirs*, &c., in such case, were not words of limitation, but referred to the special class of heirs already mentioned in the deed.

[<sup>†</sup> This case is thus reported by Croke:—John Walter being seised in fee, made a feoffment in fee to Thomas Walter, *habendum* to him and the heirs of his body, to the use of him and his heirs and assigns forever. The question was, whether Thomas Walter had an estate in fee tail only, or in fee simple determinable upon the estate tail. This depended upon two points:—1st, Whether a use might be limited upon an estate tail before or after the Statute of Uses. 2dly, Whether this limitation of uses to Thomas Walter and his heirs should not be intended the same uses, being to the feoffee himself, and to the same heirs, as it was in the *habendum*. Croke reports the case to have been adjourned; but that the opinion of the Court upon the argument inclined that he was tenant in tail; and that the limitation of the use out of the estate tail was void, as well after the Statute of Uses as before; for the statute never intended to execute any use but that which might be lawfully compelled to be executed before the statute; but this could not be of an estate tail, for the Chancery could not compel a tenant in tail, before the statute, to execute the estate; so the statute did not execute it then. Cro. Jac. 400. *Bulstrode* reports a second argument upon this case, together with the judgment of the Court; which was, that Thomas Walter took an estate tail, because a tenant in tail could not be seised to a use. 3 Bulst. 184; Tr. 13, Jac. 1; Pasch. 14, Jac. 1. *Godbolt* reports the case to have arisen upon a limitation to one and the heirs of his body, *habendum* to the donee, to the use of him, his heirs, and assigns forever; and that two points were resolved,—1st, That the limitation in the *habendum* did not increase or alter the estate given in the premises of the deed; 2dly, That a tenant in tail might stand

only prove that a tenant in tail cannot be seised to a use in fee.† But that a tenant in tail may be seised to a use, co-extensive with his estate, is a doctrine which it would now be extremely dangerous to controvert. And Lord Bacon expressly says, that a tenant in tail may be seised to a use. “If I give land in tail by deed, since the statute, to A, to the use of B and his heirs, B hath a fee simple determinable upon the death of A without issue; and like law, though doubtful, before the statute was; for the chief reason that bred the doubt before the statute was, because tenant in tail could not execute an estate without wrong; but that, since the statute, is quite taken away; because the statute saveth no right of entail, as the statute of 1 Richard III. did.” (a)

14. In Seymour’s case, 10 Jac. I., where a tenant in tail bargained and sold his estate tail to a stranger in fee, it was unanimously resolved by the Court of K. B. that the bargainee took an estate to him and his heirs, determinable upon the death of the tenant in tail. (b)

15. It may, therefore, be now laid down as an undoubted principle of law, that a *tenant in tail may be seised to a use*, even in fee; and that such use will be good against the tenant in tail himself; for as tenants in tail have, ever since the time of Lord Coke, been in the practice of transferring their estates to the persons who were to be tenants to the *præcipe* in common recoveries, in fee simple, by conveyances derived from the Statute of Uses, if it were established that a tenant in tail cannot be seised to a use, the consequence would be, that almost all the common recoveries which have been suffered for the last two

(a) Bac. Read. 57.

(b) 10 Rep. 95. Plowd. 557. Tit. 32. c. 9.

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seised to a use expressed, but such use could not be averred. Godb. 269. The same case is also reported by Moor by the name of *Carrier v. Franklin*, where the Court appears to have considered it as a question of construction; and held that the feoffee only took an estate tail, because the use to him and his heirs, immediately succeeding the *habendum*, must be construed to mean the same kind of heirs to whom the estate had been already limited,—namely, the heirs of the body of the feoffee. Moor, 848, pl. 1152.]

[† The case of *Cooper v. Franklin* was simply one of construction, it is no authority that a tenant in tail cannot stand seised to the use of another; for there, the seisin and the use were limited to the same person, (Thomas Walter,) so that no use could arise under the statute, which requires that one or more persons should be seised to the use of some other person or persons, &c.]

centuries would be void for want of a good tenant to the *præcipe*.

\*16. A *tenant for life* may also be seised to a use; \*353 but such use will determine, together with the legal estate, which is transferred to it by the statute upon the death of the tenant for life; for a *cestui que use* cannot have an estate in the use of greater extent than the seisin out of which it is raised.

17. In 2 & 3 Eliz. this case was moved:—Lands were given to two persons for their lives, and the life of the survivor of them, to the use of A B for his life. The two donees to uses died; and the question was, whether the estate to A B was determined. The Court thought it was determined; because the estate on which the use was created and raised was gone. (a)

18. It follows from this case, which is cited and admitted to be good law in Bulstrode's report of the case of Cowper v. Franklyn, and also in a case reported by Croke; that all persons having a legal estate of freehold may be seised to a use. If the use is greater than the estate out of which it is limited, it will cease upon the determination of that estate, but will be good in the mean time. (b)

19. With respect to the *different kinds of property* whereof a person may be *seised to the use of another*; the words of the statute are,—“Honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments,” which comprehends every species of *real property*, in possession, remainder, or reversion. Therefore, not only *corporeal hereditaments*, but also *incorporeal* ones, such as advowsons, tithes, rents, &c., are within this statute. Nothing, however, can be conveyed to uses but that of which a person *is seised* or to which he is entitled at the time; for in law every disposal supposes a precedent property. No person can, therefore, convey a use in land, of which he is not seised in possession, or to which he is not entitled in remainder or reversion, when the conveyance is made. (c) <sup>1</sup>

(a) Dyer, 186. a. pl. 1. Crawley's case, 2 And. 130.

(b) Cro. Car. 231. Norton v. Frecker, 1 Atk. 523.

(c) (1 McCord, Ch. R. 239.) Cro. Eliz. 401. 22 Vin. Ab. 217.

<sup>1</sup> The interest of a mortgagee, though generally a legal seisin as against the mortgagor, is not capable of being devised to uses, so as to be executed by the statute, the debt being regarded in law as the principal thing, and the mortgage only as a lien to secure the payment. Galliers v. Moss, 9 B. & C. 267; Merrill v. Brown, 12 Pick. 216.

20. Lord Bacon says the word *hereditament*, in the Statute of Uses, is to be understood of those things whereof an inheritance is *in esse*; yet that a grant of a rent charge *de novo*, for life, to a use, was good enough; although there were no inheritance in being of the rent. It should, however, be observed that, in this case, there is a seisin of the land out of which the rent is granted. (a)

354\* \*21. Copyhold estates are not, however, comprised in the Statute of Uses; because a transmutation of possession, by the sole operation of the statute, without the concurrence or permission of the lord, would be an infringement of his rights, and tend to his prejudice. (b)

22. The *second circumstance* necessary to the execution of a use by this statute is, that there must be a *cestui que use in esse*. If, therefore, a use be limited to a person not *in esse*, or to a person uncertain, the statute can have no operation.<sup>1</sup> But by the words of the statute a *cestui que use* may be entitled to an estate in fee simple, or fee tail, term for life, or years or otherwise, or in remainder or reversion.

23. With respect to those who may be *cestuis que use*, all persons who are capable of taking lands by any common law conveyance, may also have a use limited to them. By the words of the statute, corporations may be *cestuis que use*. And Lord Bacon says the king may have a use limited to him; but it behoveth both the declaration of the use, and the conveyance itself, to be by matter of record; because the king's title is compounded of both. (c)

24. Although a man cannot, by any conveyance at common law, limit an estate to his wife,<sup>2</sup> yet he might have made a *feoffment* to her use, or a covenant with another to stand seised to

(a) Bac. Read. 43.

(b) Co. Cop. s. 54. Gilb. Ten. 182. Cowp. R. 709.

(c) Bac. Read. 60.

<sup>1</sup> That is, it cannot operate until the *cestui que use* comes *in esse*. See *post*, tit. 16, ch. 5; 2 Bl. Comm. 334. Thus, where a grant is made to individuals for the use of a church, which, at the time, is not incorporated, the grantees stand seised to the use until the church receives a corporate existence; and then the statute executes the use, and the estate vests in the church. *Reformed Dutch Church v. Veeder*, 4 Wend. 494. And see *Shapleigh v. Pillsbury*, 1 Greenl. 271; *Ashurst v. Given*, 5 Watts & Serg. 323; *Roy v. Garnett*, 2 Wash. 9, 35. [Ante, tit. XI. ch. 2, § 16, note, \* 340.]

<sup>2</sup> See *Martin v. Martin*, 1 Greenl. 394. Equity will uphold such a conveyance. *Wallingford v. Allen*, 10 Peters, R. 583. *Post*, tit. 32, ch. 2, § 33.



her use. And a use now raised by a man to his wife will be executed by the statute. (a)

25. The *cestui que use* must, in general, be a *different person* from him who is seised to a use; for the words of the statute are,—“Where any person or persons stand or be seised, &c.; to the use, confidence, or trust, of any *other* person or persons,” &c. And Lord Bacon says,—“The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate. Therefore the common law ought to be expounded, that where the party seised to the use, and the *cestui que use*, is one person, he never taketh by the statute, *except* there be a direct impossibility or impertinency for the use to take effect by the common law.” (b)

26. Thus, where lands were given to a man and his wife, *habendum* to the said husband and wife, to the use of them and the heirs of their two bodies; and for default of such issue, to the use of A B; the question was, whether the husband and \* wife had an estate tail, or only an estate for their \* 355 lives. It was adjudged that they took an estate tail. Upon a writ of error in the King’s Bench, it was argued that the estate out of which the use arose was but for their lives, consequently the use could not be limited for a larger estate. But Croke, Jones, and Whitlock, were of opinion, that there was a difference where an estate was limited to one, and the use to another; there the use could not be more than the estate out of which it was derived. That it was otherwise where the limitation was to two persons, *habendum* to them, to the use of them and the heirs of their bodies; this was no limitation of the use, nor was the use to be executed by the statute, but they took by the common law. (c)

27. The same point arose in the subsequent term, in a writ of error from a judgment given in Wales. The Court held the limitation in the *habendum*, to the use of the grantees and the heirs of their bodies, to be as a limitation of the land itself, being all to one person; as if it had been said, *habendum* to them and to the heirs of their bodies; and not like the case in Dyer, 186. For true it was, when the estate was limited to one or two, to the use of others and their heirs, the first estate was

(a) 1 Inst. 112. a.

(b) (Jackson v. Myers, 3 Johns. 388. Jackson v. Cary, 16 Johns. 302.) Bac. Read. 63.

(c) Jenkins v. Young, Cro. Car. 230. Dyer, 186. a. n.

not enlarged by this implication, and the use could not pass a greater estate. But here, when the grant and *habendum* conveyed the estate, and the limitation of the use was to the same person, that showed the intent of the parties, and was a good limitation of the estate; for it was not an use divided from the estate, as where it was limited to a stranger, but the use and estate went together; wherefore it was all one as if the limitation had been to them and the heirs of their bodies. Sir William Jones said he knew many conveyances had been made in this manner, and twice brought in question, and adjudged to be an estate tail. (a)

28. It was held by Holt, C. J., and Powell, in a subsequent case, that when a fine was levied, or a feoffment made, to a man and his heirs, the estate was in the cognizee or feoffee, not as an use, but by the common law; and might be averred to be so. This doctrine is most ably discussed by Mr. Booth, in an opinion on the following case:—An estate was conveyed, by lease and release, to D., C., and S., and their heirs, to hold unto the said D., C., and S., for and during the natural lives of them and the survivor and survivors of them. The question was whether

356 \* they \* took by the common law, or by the Statute of Uses. As to this point, Mr. Booth says,—“ We will now return to the words of the *habendum* in the release; taking the words, ‘to the use.’ The *habendum* stands literally thus: to hold unto the said D. and his companions, their heirs and assigns, to the only proper use and behoof of the said D. and his companions, their heirs and assigns, for and during the natural lives of the said D. and his companions, and the life and lives of the survivor and survivors of them. Here you observe the use limited is not limited to any person different from the person to whom the estate is granted. The *habendum* is to D. and his companions, and the use is limited to D. and his companions; so that the estate and the use are both to one and the same person; and therefore, this cannot be a statute use, for the seisin doth not go or belong to one person, and the use to another person; whereas the statute requires that there should be a standing seized by some third person or persons to the use of some *other person*. And that case of *Jenkins v. Young* is express, that where the use is not divided from the estate, and the use and the estate

(a) *Meredith v. Jones*, Cro. Car. 244. *Ante*, s. 26.

go together, there it amounts only to a limitation of the estate, and, consequently, is not a statute use, but only a common-law use. And, if at this day, a man should enfeoff I. S. to hold to the said I. S. and his heirs, to the use and behoof of the said I. S. and his heirs forever, no man living would call that a statute use; for the words would import no more than the words, 'for his and their sole benefit and behoof;' and would only serve to show in how ample and beneficial a manner the feoffee was to take the estate limited to him by the *habendum*; which being manifestly an estate at common law, could not also give or create a statute use. The words of Lord Holt, in the case of Lord Altham *v.* Earl of Anglesey, before recited, are directly in point. In like manner it would be, if there were a feoffment to a man and his assigns, to hold to that man and his assigns, to the only use and behoof of him and his assigns, during his life; that would only limit an estate of freehold to him for his life, at common law; and not be the limitation or creation of any statute use. It would be the same in the case of a feoffment to one of lands, to hold to the feoffee and his heirs, to the only use and behoof of the feoffee and his heirs, during the lives of A, B, C, D, and \*twenty other persons. \*357 There the words to the use and behoof would pass no statute use, or pass any thing distinct from the estate; which estate would be an estate at common law; and the words to the use and behoof would serve only to show the amplitude of the estate given by the feoffment; and that the feoffee and his heirs were to take the same for his and their own benefit, without return of any service whatever to the donor." (a)

29. There are, however, *some cases* where the *same person may be seised* to a use, and *also cestui que use*. Thus, if a man makes a feoffment in fee to one, to the use of him and the heirs of his body; in this case, for the benefit of the issue, the statute, according to the limitation of the uses, directs the estate vested in him by the common law, and executes the same in himself, by force of the statute. And yet the same is out of the words of the statute, which are,—“To the use of any other person.” And here he is seised to the use of himself. But the statute has always been beneficially expounded, to satisfy the intention of

(a) Gilb. Rep. 16, 17. Booth's Cases and Opin. vol. 2. 281. *Ante*, s. 26. *Doe v. Passingham*, 6 Bar. and Cress. 305.

the parties, which is the direction of the use, according to the rule of law. (a)

30. So if a man seised of lands in fee simple covenants with another, that he and his heirs will stand seised of the same land, to the use of himself and the heirs of his body; or to the use of himself for life, the remainder over in fee; in that case, by the operation of the statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the limitation of the use. (b)

31. Lord Bacon says, if a person enfeoffs I. S. to the use of I. D. for life, remainder to the use of I. S. for life, remainder to the use of I. N. in fee, I. S. is in by the statute; because the law will not admit fractions of estates. So if a person enfeoffs I. S. to the use of himself and a stranger, they shall both be in by the statute, because they cannot take jointly, taking by several titles. Like law, if I enfeoff a bishop and his heirs, to the use of himself and his successors; he is in by the statute, in right of his see. (c)

32. [The Statute 27 Hen. VIII. c. 10, enacted, that where one or more persons stand seised to the “use, trust, or confidence of any other persons, &c., such persons, &c., that have the use, trust, or confidence, shall be adjudged in the lawful seisin, estate, and possession,” &c. Hence, it follows, that where lands are conveyed to A and his heirs, in trust for B and his heirs, 358 \* the \* legal estate or use executes in B. So also where a limitation is to A and his heirs, to the intent and purpose that B and his assigns may receive and take a rent-charge for his life, or that he and his assigns may receive the rents and profits during his life, in the one case he takes the legal estate for life, and in the other a legal rent-charge.] (d)

33. The *third circumstance* necessary to the execution of a use by this statute is, that there should be a *use in esse*, in possession, remainder, or reversion. And this use may either be created by an express *declaration*, or may *result* to the original owner of the estate, or arise from an *implication of law*. (e)

34. When these three circumstances concur, *the possession and legal estate* of the lands, out of which the use was created,

(a) Bac. Read. 63. 13 Rep. 56. (1 Sand. Uses, 89.) (b) 13 Rep. 56. (c) Bac. Read. 64.

(d) *Ante*, s. 3. Bac. Uses, 47. *Eure v. Howard*, Pre. Cha. 318. 345. *Broughton v. Langley*, 2 Salk. 679. *Right v. Smith*, 12 East, 454. *Hummerston's case*, Dyer, 166. a. note (9.)

(e) 1 Rep. 126. a. *Infra*, c. 4.

are immediately taken from the feoffee to uses, and *transferred by the mere force of the statute* to the *cestui que use*. And the seisin and possession thus transferred are not a seisin and possession in law only, but an *actual seisin and possession in fact*; not a mere title to enter upon the land, but an actual estate. (a)

35. Lord Coke appears to have been of opinion, that by a conveyance to uses, executed by the statute, only a freehold in law passed. And others have said that the statute only transfers a civil seisin, it being impossible for an act of parliament to give an actual seisin; therefore that an entry is necessary to complete the seisin. It has, however, been found that the admission of this principle would be attended with dangerous consequences; it is, therefore, now held that the statute transfers the actual possession; a construction fully warranted by the words of the statute, which are,—“every person having a use shall be in lawful seisin, estate, and possession, to all intents, constructions, and purposes, in the law.” (b)

36. The third section of the statute contains a saving “to all and singular those persons, and to their heirs, which were or thereafter should be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action, as they or any of them might have, to his and their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they were, or thereafter should be, seised to any other use;” as if the said act had not been made.

37. In consequence of this clause, *no* term for years or other interest whereof a person, to whom lands are conveyed to uses, \* is possessed in his own right, will be *merged* \* 359 or destroyed by such conveyance. (c)

38. A husband being seised in fee, made a lease to O. and S. in secret confidence, for the preferment of his wife. Afterwards he made a feoffment to O. and others, of the same lands to other uses. It was decreed in the Court of Wards, by the advice of Wray, Anderson, and Manwood, that the term was not extinguished by the feoffment, by reason of the proviso; and because O. had the lease to his own use, it was not extinguished by the feoffment, which he took to the use of another. (d)

(a) Bac. Read. 46. Cro. Eliz. 46.

(b) 1 Inst. 266. b. Gilb. Uses, 230.<sup>1</sup> Barker v. Keate, 2 Mod. 249. Tit. 32. c. 11. (Duvall v. Bibb, 3 Call. 362.)

(c) Vide *Infra*, tit. 39.

(d) Cheyney's case, Moo. 196. 2 And. 192.

39. A demised lands to B for ninety-nine years; afterwards A, by bargain and sale enrolled; and fine, conveyed the same lands to B and others, and their heirs, to the use of them and their heirs, to the intent that a common recovery should be had and suffered against them, with voucher of the lessor, to the use of a stranger; all which was done accordingly. The question was, whether the term for years was merged. And it was resolved that the term still subsisted; for although it was merged by the union of the estates till the recovery was suffered, yet when that was done, the uses thereof being guided by the bargain and sale, it was the same as if there had been no conveyance; it being within the equity and intent of the saving in the third section of the Statute of Uses; for the intention of that statute was not to destroy prior estates, but to preserve them. It was also agreed by the whole Court, that if a fine or feoffment had been levied or made to the lessee for years, his term would not have been thereby extinguished. An objection was made that the bargain and sale, and fine, were to the use of the lessee for years, otherwise he could not have been tenant to the freehold; therefore the saving in the Statute of Uses did not extend to this case; but it was answered and resolved, for the former reasons, that the term was saved by the equity of the statute. (a)

40. The saving in the Statute of Uses extends to those cases where the inheritance is conveyed by lease and release.

41. Cook let to Fountain for ninety-nine years; two years after, Cook conveyed the inheritance, by lease and release, to Fountain and another, to the use of Cook and the heirs of his body, with divers remainders over. The question was, whether, by this conveyance, the lease for ninety-nine years was merged and destroyed, in all or in part. First, it was agreed that, 360 \* if such conveyance to uses had been by \* fine or feoffment, it would not have been destroyed, but would have been preserved by the saving in the Statute of Uses. So likewise it was admitted that, if there had been no lease for a year, but the release had been immediate to the lessee for ninety-nine years, to such uses, in this case also the lease for ninety-nine years had been preserved by force of that statute; but here being a lease for a year precedent, it was argued that this was to the use of

(a) *Ferrers v. Fermor*, Cro. Jac. 648. 1 Vent. 195. 1 Mod. 107.

the lessee, and then by acceptance thereof, he admitted the lessor's power to make such lease; and by consequence before the release to the other uses came to take place, then the release after could not revive it; it was also said, that though this were all one conveyance, yet it differed from a feoffment, for it would not purge a disseisin, nor make a discontinuance; that if, before the release, the lessee granted a rent-charge or made a lease for half a year, and then a release was made to him and his heirs to such uses, yet he who had the inheritance would have no remedy to avoid these charges but in Chancery.

On the other side it was argued, that this was no merger of the ninety-nine years' term; or if it were, yet for no more than a moiety; for the reason of merger and extinguishment was not, as had been argued, the party's admittance of the lessor's power to make a lease, but the merger was effected by the accession of the immediate reversion to the particular estate; therefore a new lease by the lessor to his lessee was not a merger or surrender of the first term, if there was any interposing or intermediate term; yet, in that case, the lessee admitted the lessor's power to make the lease presently, as much as in the other. Then if the union and accession of the two estates were the cause of the merger, the *quantum* of the thing granted would be the measure of that merger; by consequence, the first lease here would be extinguished, but for a moiety of the lands. Secondly, that it was not extinguished for any part, for the term was saved within the letter, or at least within the equity of the Statute 27 Hen. VIII. c. 10, s. 3; for the intent of the saving therein was to preserve the balance between the *cestui que use* and his feoffees, according to the rule of equity, by which they were governed before. Now, suppose that Fountain had a lease for ninety-nine years before this statute, and that Cook had desired him to accept a feoffment to his use; without doubt, the Chancery would not have compelled him to assign, till the ninety-nine years' term expired. And the same right \*seemed now to be preserved \*361 by the saving; for the words were general,—“All that shall be seised to any use,” not all that shall be seised by feoffment or fine; so that the seisin to use was the only thing the statute regarded, not by what sort of conveyance; that lease and release was become a common conveyance; and the lease being

expressly said to be, to enable the lessee to accept a release to other uses, should not be construed to any other intent, or to be to his own use, otherwise than to enable him to accept such release. Then if it should be admitted that the lease for ninety-nine years were extinguished by the lease for a year, yet by the release it was revived; for being but one conveyance, it was within the equity of the statute. The case of *Ferrers v. Fermor* was stronger; and yet it was resolved there, that though the bargain and sale had destroyed the term for a time, yet by the recovery it was revived; because then but one conveyance *ab initio*; so here.

No judgment appears to have been given; but Lord C. B. Gilbert says it seemed reasonable that the lease for ninety-nine years should not be merged, or at least but for a moiety; and even in that case, equity would set up the moiety, or the whole term again. (a)

(a) *Cook v. Fountain*, Bac. Ab. tit. Lease, R. Vide, tit. 32. c. 11. Ante, s. 39.



## CHAP. IV.

## MODERN DOCTRINE OF USES.

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| SECT. 1. <i>Construction of the Statute.</i><br>3. <i>Contingent Uses.</i><br>4. <i>Uses arising on the Execution of Powers.</i><br>8. <i>Conveyances derived from the Statute of Uses.</i><br>13. <i>Whether the Statute extends to Devises.</i><br>16. <i>Resulting Uses.</i><br>32. <i>Uses by Implication.</i><br>35. <i>No Use results but to the Owner of the Estate.</i> | SECT. 37. <i>Nor against the intent of the Parties.</i><br>41. <i>Which may be proved by Parol Evidence.</i><br>42. <i>Nor which is inconsistent with the Estate limited.</i><br>47. <i>Nor on an Estate Tail, for Life or Years.</i><br>51. <i>Nor on a Devise.</i><br>52. <i>What Use results to a Tenant in Tail.</i> |
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SECTION 1. When the Statute of Uses first became a subject of discussion in the courts of law, it was held by the judges that no uses should be executed by that statute, which were limited against the rules of the common law. For it appeared from the preamble that *it was the intent of the makers of the act to restore the ancient law*, and to extirpate and extinguish such subtle practised feoffments, fines, recoveries, abuses, and errors, tending to the subversion of the good and ancient common law of the land. So that it was plain this act was never intended to execute any use which was limited against the rules of the common law; the object of it was to extinguish and extirpate, not the feoffment, fine, or recovery, for these were laudable and good conveyances of lands and tenements, as in effect recited in the beginning of the preamble; but those uses, which were abuses and errors, therefore mischievous, because they were against the rules of the common law. The statute was a law of restitution,—namely, to restore the good ancient common law, which was, in a manner, subverted by \*abusive and erroneous \* 363 uses; not to give more privilege to the execution of uses than to estates which were executed by the common law. (a) <sup>1</sup>

(a) 1 Rep. 129. b.

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<sup>1</sup> A modern Use may be defined as “an estate of right, which is acquired through

2. The Courts have *so far adhered* to this construction of the statute, that *the same technical words of limitation* are now required in the creation of estates, through the medium of uses, as in the creation of estates at common law. But, in many other instances, this doctrine was departed from; and advantage was taken of an expression in the Statute of Uses, in order to support several of those modifications of property which had been allowed by the Court of Chancery in declarations of uses, when they were distinct from the legal estate. (a)

3. The Statute of Uses enacts that the estate of the feoffees to uses shall be vested in the *cestuis que use*, “*after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust, that was in them.*” Now, the Court of Chancery having permitted a limitation of a use in fee or in tail to arise *in futuro*, without any preceding estate of freehold to support it; and also that a use might change from one person to another, by matter *ex post facto*, though the first use were limited in fee; the Courts of Law, in process of time, admitted of limitations of this kind, in conveyances to uses; and held that in such cases the statute would transfer the possession to the *cestui que use* after such quality, form, and condition, as he had in the use. (b) †

4. By the rules of the common law, no restriction or qualification could be annexed to a conveyance of lands, except a condition. In consequence of this principle, a fine or feoffment, with a power of revocation annexed to it, was void at common law; because the fine or feoffment transferred the whole property and right of disposal to the cognizee or feoffee; therefore the power of revocation being repugnant to the force and effect of the preceding words, was void. Besides, the admission of such a clause would have introduced a double power, vested in different persons, over the same property; which was contrary to the rules of the common law. (c)

5. We have, however, seen that before the Statute of Uses, if

(a) 1 Rep. 87. b. 1 Atk. 591.

(b) *Ante*, c. 2. s. 37.

(c) 1 Inst. 237. a.

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the operation of the Statute of 27 Hen. 8, c. 10; and which, when it may take effect according to the rules of the common law, is called the legal estate; and when it may not, is denominated a Use, with a term descriptive of its modification.” Cornish on Uses, p. 35.

[† An account of the nature of these limitations will be given in Title 16.]

a feoffment was made to uses, the *feoffor might reserve a power*, either to himself, or to some other person, *to revoke the uses* \* declared on the feoffment, and to appoint the \* 364 feoffees to stand seised to other uses. The principle on which uses were originally founded being, that the feoffee to uses was bound in conscience to pursue the directions of the feoffor, this obligation was equally binding, whether the agreement was that the feoffor should receive the rents and profits himself, or some stranger; or whether they were to be paid in such manner as the feoffor, or any other person to whom he delegated his power, should at any future time appoint. (a)

6. Now, as the Statute of Uses vests the legal estate in the *cestui que use*, after such quality, manner, and form, as he had in the use; the Courts of Law concluded that in all conveyances to uses, *a power might be reserved* of revoking a former limitation of a use, and of appointing a new use to some other person. (b) †

7. If a person conveys his estate, by lease and release, to trus-

(a) *Ante*, c. 2. s. 38.

(b) 1 Inst. 237. a.

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[† In an opinion of the late Mr. Booth, which has been published by Mr. Hilliard at the end of Sheppard's Touchstone, is the following account of contingent uses and powers:—"By the old law, no fee simple could be limited upon or after a fee simple; but since the Statute of Uses, executory fees by way of use have not only been allowed, but are become frequent, in all conveyances operating by way of transmutation of possession. The uses are served out of the seisin of the feoffees, grantees, releasees, &c. In all future or executory uses there is, the instant they come *in esse*, a sufficient degree of seisin supposed to be left in the feoffees, grantees, &c., to knit itself to and support those uses; so as that it may be truly said the feoffees or grantees stand seised to those uses; and then, by force of the statute, the *cestui que use* is immediately put into the actual possession. (This observation involves the doctrine of *Scintilla Jaris*, which is discussed in a future page, Vol. II. tit. 16, ch. 5, 6, 7, &c.) It is wholly immaterial how, or by what means, the future use comes *in esse*; whether by means of some event provided for, in case it happened in the creation of the uses, which event may be called the act of God; or by means of some work performed by any certain person, for which provision was likewise made in the creation of the uses, which may be called the act of man. In either case the statute operates the same way; for the instant the future use comes *in esse*, either by the act of God or the act of man, the statute executes the possession to the use, and the \* *cestui que use* is deemed \* 365 to have the same estate in the land, as is marked out in the use, by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use; when it arises from the act of some agent or person nominated in the deed, it is called a use arising from the execution of a power. In truth, both are future or contingent uses, till the act is done; and afterwards they are, by the operation of the statute, actual estates. But till done, they are in suspense, the one depending on the will of heaven, whether the event shall happen or not; the other on the will of man."]

tees and their heirs, to the use of himself for life, remainder to his first and other sons in tail, and inserts a proviso in the release that it shall be lawful for him, at any future time, to revoke these uses, and to declare new ones; and that immediately upon such revocation and new declaration, the trustees shall stand seised of the lands to the use of such persons as the settlor shall appoint; this is a power of revocation and appointment. As soon as it is executed, the uses originally limited cease, and a new use immediately arises to the person named in the appointment, for such estate as is given to him by it; and the statute transfers the legal estate to such appointee, who, by that means, acquires the actual seisin and possession.†

8. Lord Bacon says, the *chief object* of the Statute of Uses was to destroy all those secret conveyances to uses which had been so much complained of. “The principal inconvenience,” (says he,) “which is *radix malorum*, is the diverting from the grounds and principles of the common law, by inventing a mean to transfer lands and inheritances, without any solemnity or act notorious; so as the whole statute is to be expounded strongly towards the extinguishment of all conveyances, whereby the freehold or inheritance may pass, without any new confections of deeds, executions of estate, or entries.” It is, therefore, somewhat singular that this statute, instead of having had that effect, has, on the contrary, given rise to several new modes of transferring lands, unknown to the simplicity of the common law, and of a more secret nature than feoffments to uses; so that,  
 366 \* notwithstanding the great caution with which this statute was made, it has not answered the intention of the legislature. (a)

9. Lord Bacon, has, however, clearly proved, that the intention of the statute was only to destroy the estate of the feoffee to uses, by transferring it to the persons who were entitled to the use; and not to destroy the form of the conveyance to uses. I. Because the words of the statute are,—“Where any person is seised, or *hereafter* shall be seised to any use,” &c. II. In the

(a) Bac. Read. 33. 1 Atk. 591.

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[† The nature of revocations and appointments to uses will be explained hereafter. Tit. 32, c. 13.]

same session in which this statute was made, it was enacted, that all bargains and sales to uses should be enrolled; which proved the intention of the legislature, to leave the form of the conveyance, with the addition of a farther ceremony. III. By the twelfth section of the statute, it was provided that the king should not take any primer seisin, or other feudal profits, on account of any estate which should be executed by means of the statute, till the 1st of May, 1536; but that he should take the feudal profits for all uses, which should become executed by the statute *after* that time. (*a*)

10. But whatever might have been the intention of the legislature in passing this statute, it is certain that it has given rise to several new sorts of conveyances, which operate contrary to the rules of the common law; for it being soon observed that there was nothing in the statute to prevent the raising of uses, but only a provision that when a use was raised, the possession of the land should be transferred to such use, it was only necessary to raise a use, and the legal seisin and estate, together with the actual possession, became immediately vested in the *cestui que use*, without livery of seisin, entry, or attornment. (*b*)

11. In consequence of this doctrine, it became customary to raise a use to the person to whom the lands were intended to be conveyed, and then the statute transferred the possession to the *cestui que use*. This was done in two different ways; *first*, by a conveyance which only transferred a use, and which is said to operate without any transmutation of possession, because the alteration of the legal seisin is effected by the mere operation of the statute. There are two modes of conveyance which operate in this manner; a bargain and sale to uses, and a covenant to stand seised to uses; of which an account will be given hereafter.† The *second mode* of conveying lands through the medium \* of uses, is effected in the following manner:— \*367 The legal estate and possession is transferred by a feoffment, fine, or recovery,‡ to some indifferent person, who stands in the place of the ancient feoffee to uses; a deed is then executed, reciting, that by such feoffment, fine, or recovery, the lands

(*a*) Bac. Read. 39.

(*b*) *Ante*, c. 3. s. 34.

[† Tit. 32, ch. 9 & 10.]

[‡ Before the recent Stat. 3 & 4 Will. 4, c. 74.]

have been transferred to A B, and declaring that such feoffment, fine, or recovery, shall enure and operate, and that the feoffee, cognizee, or recoveror, in such feoffment, fine, or recovery, shall be seised of such lands, to the use of a third person. Or else a deed is first executed, reciting that a fine or recovery is intended to be levied or suffered, or covenanting to levy a fine or to suffer a recovery, and declaring that these assurances, when completed, shall enure to the use of a third person.

12. In both these cases a *use arises out of the seisin of the feoffee*, cognizee, or recoveror, to the person to whom such use is declared, and the statute immediately transfers to that use the legal estate and actual possession. These latter assurances are said to operate by transmutation of possession,† because the legal seisin and estate is first transferred by some common-law conveyance or assurance. They are usually called deeds to lead or declare the uses of a fine or recovery; and will be treated of hereafter. (a)

13. As the Statute of Uses preceded the Statute of Wills, the former has been said not to extend to devises to uses. It is, however, observable, that the words of that statute are,—“Where any person, &c., is seised to the use of any other person by reason of any bargain, sale, &c., *will*, or otherwise.” Now, though at the time when the statute was made, the word *will* could only apply to wills of lands then devisable by custom, yet when  
368\* the statute\* of wills passed, the word *will* in the Statute of Uses became applicable to wills, or rather to devises, of all the lands over which a testamentary power was given.

(a) (See tit. 32. c. 9, 10.)

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[† To the fine, feoffment, and recovery, may be added the ordinary conveyances of Lease and Release, and Grant, both of which operate by transmutation of possession or seisin; the author treats of them in Vol. IV. title Deed, ch. 4, s. 33, and ch. 11.]

The student is referred to the two tables in the following note, which may assist him in understanding the effect of the Statute of Uses, in the various forms of conveyance which do and which do not, operate by transmutation of possession or seisin; the intention being, in the following example, (table No. 1,) that under each of these modes of conveyance, the seisin should be transferred to A, the use or legal estate to B, and the trust estate or equitable ownership to C, so that they may take the same interest, or stand in the same character in each conveyance.

In the table No. 2, the student will see the different effects of the statute upon the interests of the persons taking under a limitation to A and his heirs, to the use of B and his heirs, to the use of or in trust for C and his heirs, by a declaration of the uses

\* 14. In a case in 2 & 3 Phil. and Mary, it is said that \* 369  
devises of land in use have been common. In 23 Eliz.  
it was agreed by the Court of Wards, that a devise might be to  
the use of another; and Lord Coke is there reported to have been

of a fine or recovery, by a feoffment, lease and release, grant, bargain and sale, covenant to stand seised, and an appointment.]

No. 1.

In order to give	A. the seisin,	B. the use or legal estate.	C. the trust estate, or equitable ownership.	
In a Fine,	A. must be made Conuzee,	B. <i>Cestui-qui use</i> by the deed leading or declaring the uses of the fine.	C. <i>Cestui-que trust</i> .	Operating by transmutation of the seisin or possession at common law.
Recovery,	Recoveror,	the same of the recovery.	the same as above.	
Feoffment,	Feoffee,	<i>Cestui-que use</i> .	<i>Cestui-que trust</i> .	
Lease and Release,	<i>Releasee</i> , who is of course the lessee or bargainee for a year.	same.	same.	
Grant,	Grantee,	same.	same.	
Bargain and Sale, }	Bargainor,	Bargainee.	same.	Not operating by transmutation of seisin or possession.
Covenant to stand seised, }	Covenantor,	Covenantee being <i>cestui-qui use</i> .	same.	
Appointment,	The Releasee, grantee, &c., to uses in the deed creating the power of appointment.	Appointee.	same.	

of opinion, that the son of a devisor takes by descent, when the *cestui que use*, to whom the land is devised, refuses the use; for the devisee cannot take it to his own use, because, if the use be void, the devise is also void. In the case of *Broughton v. Langley*, which will be stated in the next title, it was agreed that a 370\* devise may be \* to the use of another; and the use will be executed, if the intent of the devisor appear. In Gilbert's Uses, it is also said that a devise may be made to a use. (a)

No. 2.

	To A. and his heirs.	To the use of B. and his heirs.	To the use of, or in trust for C. and his heirs.	Operating by transmutation of seisin or possession.
In a Fine	A. will take the use.	B. nothing.	C. the equitable fee.	
Recovery. } declared so to enure.	A. will take the same as above.	B. nothing.	C. same as above.	
Feoffment.	A. will take the seisin.	B. the use.	C. same as above.	
Lease and Re-lease. }	the same	as	above.	
Grant.	the same	as	above.	Not operating by transmutation of seisin or possession.
Bargain and Sale. }	A. will take the use.	B. nothing.	C. the equitable fee.	
Covenant to stand seised. }	the same	as	above.	
Appointment.	the same	as	above.	

[The preceding tables were inserted by the Editor in his edition of *Watkin's Principles*, 1831, p. 233, 234.]

(a) *Dyer*, 127. a. *E. Hartop's case*, 1 *Leon.* 253. *Lutw.* 823. *Gilb. Uses*, 162, 281.



15. In the case of an immediate devise to uses, as a devise to the use of A for life, remainder to the use of B in tail, it is admitted that the remainder cannot take effect by way of use, because there is no seisin to serve the use. But in the case of a devise to A and his heirs, to the use of B for life, remainder to the first and other sons of B in tail, there is no reason why the seisin of A should not be deemed<sup>a</sup> sufficient to support the uses to the sons of B. (a) †

16. Before the Statute of Uses, if a person had conveyed his lands to another, without any consideration, or declaration of the uses of such conveyance, *he* became entitled to the use or pernaney of the profits of the lands thus conveyed. This doctrine was *not altered* by that statute; and, therefore, it became an established principle, that where the legal seisin and possession of lands are transferred by any common-law conveyance or assurance, and no use is expressly declared,<sup>1</sup> nor any consideration or \* evidence of intent, to direct the use; such use shall \* 371 *result back to the original owner* of the estate; for where there is neither consideration, nor declaration of uses, nor any circumstance to show the intention of the parties, it cannot be supposed that the estate was intended to be given away. (b)

17. In consequence of this principle, Lord Coke has laid it

(a) See tit. 16. c. 5.

(b) Dyer, 186. b. 11 Mod. 182.

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[† In opposition to this doctrine, a note to an opinion of the late Mr. Booth's has been published,—Collect. Jur. v. 1, 427,—in which it is said that the Statute of Uses does not operate on a devise to uses. This note is not annexed to the original opinion, which was in the possession of the late Mr. Hilliard, though it is said by Mr. Butler—1 Inst. 271, b. n. 1, s. 3, 5—to be annexed to two copies of the opinion made immediately under the eye of Mr. Booth, and delivered by him to the persons in whose custody they are, and also in a copy of it bequeathed by Mr. Booth to Mr. Holliday. Admitting the authenticity of this note, and the great authority to which Mr. Booth's opinions are justly entitled, yet, as it has been an universal practice for the last two centuries to devise lands to trustees and their heirs, to various uses, with several powers, in the same words as are used in declarations of uses on fines and recoveries, it would be extremely dangerous, at this time, to question the operation of the Statute of Uses in such cases. In the construction of wills, the intention of the testator must be the guide, and it is now well settled, that if it be apparent, from the technical penning of the devise, that the testator intended to bring the Statute of 27 Henry 8, ch. 10, into operation, effect will be given to that intention, and the uses will be executed in the will as if they were limited by deed. 1 Vern. 79, 415; 2 Salk. 679; 2 Atk. 573; 2 P. Will. 134.]

<sup>1</sup> It is sufficient that the use be declared, though no consideration be expressed in the deed. Sprague v. Woods, 4 Watts & Serg. 192.

down as a *rule*, — “That *so much* of the use as the owner of the land does *not dispose of, remains in him*.” So that where a person seised in fee simple<sup>1</sup> levied a fine, or suffered a recovery, without any consideration, or declaration of the uses to which it should enure, the use resulted back to himself; and the statute immediately transferred the legal estate to such resulting use; by which means he was seised in fee simple in the same manner as he was before. If any particular uses were *declared*, so much of the old use as was not declared to be vested in some other persons, resulted back to the original owner. (a).

18. Thus, where a man made a feoffment to the use of such person or persons, and for such estate and estates, as he should appoint by his will; it was resolved that the use resulted to the feoffor till he made an appointment. (b)

19. So where a person made a feoffment to the use of himself, and his intended wife, after their marriage; it was determined that the use resulted to the feoffor and his heirs, till the marriage. (c)

20. In an ejectment tried before Lord Chief Baron Parker, this short case was reserved for the opinion of the Court. A B, being in possession of the lands in question, levied a fine *sur conusans de droit come ceo, &c.*, to the conusee and his heirs, without any consideration expressed; and without declaring any use thereof; nor was it proved that the conusee was ever in possession. So that the single question was, whether the fine should enure to the use of the conusor, or to that of the conusee. After two arguments, the Court gave judgment for the plaintiff, who claimed as heir of the conusor; and said, that in the case of a fine *come ceo, &c.*, where no uses were declared, whether the conusor were in possession, or the fine were of a reversion, it should enure to the old uses, and the conusor should be in of the old use. That in the case of a recovery suffered, the same should enure to the use of him who suffered it, (who was 372 \* commonly the vouchee,) if no uses were declared. So, in this case, the ancient use was in the conusor at the time of levying the fine; for it seemed to have been long settled;

(a) 1 Inst. 23. a. 271. a. Dyer, 166. a.

(b) Sir E. Clere's case, 6 Rep. 17. b. (c) Woodliffe v. Drury, Cro. Eliz. 439.

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<sup>1</sup> Since altered in England, by Stat. 3 & 4 Wm. 4, c. 74.

that a fine without any consideration, or uses thereof declared, should enure to the ancient use in whomsoever it was, at the time of levying the fine; and as it was here in the conusor, at the time, the judgment must be for the plaintiff. (a)

21. Where a *husband and wife* levied a fine of the *wife's estate*, without any sufficient declaration of uses, it was held that the use resulted back to the wife only; because the estate in the land passed only from her, and the husband joined with her only for conformity. (b)

22. Where a person levied a fine of his estate to trustees, to certain uses, and *did not declare any use* of the estate during his own life, it would result to himself.

23. A fine was levied to the use of trustees for 700 years, remainder to other trustees for 300 years, and from and after the death of the cognizor, to the use of his son for life, remainder to the first and other sons of such son in tail. It was resolved by the Lord Keeper, after consideration had with all the Judges, and a case, that as the cognizor had not limited away the freehold to any person during his life, it resulted back to himself. (c)

24. Archdale Palmer, in consideration of the marriage of his son, settled an estate to the use of his son for life, remainder to his intended wife for life, remainder to the first and other sons of the marriage in tail, remainder to the heirs male of the body of Archdale Palmer, remainder over. It was resolved, that as the limitations to the son, and his first and other sons, might determine during the life of Archdale Palmer, a use resulted to him for life, expectant upon the determination of the estates limited to his son, &c. (d)

25. But where the use is *expressly limited away* during the life of the grantor, no use can result to him.

26. A person, in consideration of marriage, conveyed lands to trustees, to the use of himself and his heirs till the marriage, then to the use of his intended wife for life for her jointure, remainder to trustees and their heirs during the life of the husband, in trust to support contingent remainders, but to permit

(a) *Armstrong v. Wholesey*, 2 Wils. R. 19.

(b) *Beckwith's case*, 2 Rep. 58. a. *Dyer*, 146. b.

(c) *Penhay v. Hurrell*, 2 Vern. 370. 2 Freem. 258.

(d) *Wills v. Palmer*, 2 Black. R. 687. *Fearne*, Cont. Rem. 45, 6th edit.

the husband to receive the rents and profits during his  
 373 \* life, \* remainder to the first and other sons of the marriage,  
 in tail male, remainder to the heirs male of the husband  
 by his then intended wife, remainder over. It was resolved,  
 that no use resulted to the husband, because there was an express  
 estate limited to the trustees during his life. (a)

27. The use will *result according to the estate which the parties have* in the land. Thus, if there were two joint tenants, and they levied a fine without any declaration of uses, the use should be to them of the same estate as they before had in the land. So if A, tenant for life, and B in remainder or reversion, levied a fine generally, the use should be to A for life, the remainder or reversion to B in fee. For each granted that which he might lawfully grant; and each shall have the use which the law vested in them, according to the estate which they conveyed over. So if A, seised in fee of an acre of land, and he and B levied a fine of it to another, without consideration, the use would be to A only and his heirs; for a use, which is but a trust and confidence, and a thing in equity and conscience, shall be, by operation of law, to him who in truth was owner of the land, without having regard to estoppels or conclusions, which are averse from truth and equity. (b)

28. It was determined, in a modern case, where a fine was levied by a tenant for life, together with the remainder-man in tail, and the reversioner in fee, and a declaration of uses was executed by the tenant for life, and the remainder-man in tail only, that the use of the reversion in fee resulted to the reversioner. (c)

29. It is somewhat doubtful, whether in the case of a lease and release, without any declaration of uses, the use results to the releasor, for reasons which will be stated when that mode of conveyance is explained. But if any particular use is declared on a lease and release, the residue of the use will result back to the releasor. (d)

30. Where the *same use is limited* to the owner of the estate, *which would have resulted* to him in case no declaration of that

(a) *Tippin v. Coson*, 4 Mod. 380. 1 Ld. Raym. 33. (Comb. 813.)

(b) 2 Rep. 58. a.

(c) *Roe v. Popham*, 1 Doug. Rep. 24.

(d) *Vide tit. 32. c. 11.*

use had been made, the *declaration is void*; and he takes it as a *resulting use*. (a)

31. Anthony Mitford, being seised in fee of the estate in question, conveyed the same to the use of his eldest son and his wife, and the heirs male of the body of his son, remainder to the use of \*his own right heirs. It was resolved, that \*374 the use limited to the right heirs of Mitford was the ancient use, which was never out of him, and was, in fact, a reversion in him to grant or charge; and would descend from him to his heir if it had not been mentioned; that the limitation to his right heirs was, therefore, void,† being no more than what the law had already vested in him. (b)

32. The rule that *so much* of the use as the owner of the land does not dispose of, *remains* in him, takes place in those conveyances to uses which operate *without* transmutation of possession, as in covenants to stand seised, and bargains and sales, where the use arises out of the estate of the covenantor or bargainor; for in these cases so much of the use as the covenantor or bargainor does not dispose of, still remains in him, as his old estate; and is called a *use by implication*.

33. A, being tenant in fee, covenanted to stand seised to the use of his heirs male, begotten, or to be begotten on the body of his second wife. It was determined that A took an estate for life by implication; for the limitation being to the heirs of his body, &c., and it being impossible for him to have any such heirs during his life, as *nemo est hæres viventis*, the use was undisposed of during his life, and consequently remained in him. (c)

34. It follows from the same principle, that *where no use arises*

(a) 1 Inst. 22. b.

(b) Read and Morpeth v. Errington, Cro. Eliz. 321. Moo. 284. 2 Rep. 91. b.

(c) Pybus v. Mitford, 1 Vent. 327.

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[† The recent Statute of 3 & 4 Will. 4, c. 106, s. 3, materially alters the law in this respect, so far as regards limitations in deeds executed after the 31st day of December, 1833, and in wills of testators dying after that day. For it enacts, that when any land shall have been limited by any assurance executed after the said day, to the person or to the heirs of the person who shall thereby have conveyed the land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

In respect of wills, it enacts, that when any land shall have been devised by any testator, (dying after the said day,) to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent.]

upon a covenant to stand seised, or bargain and sale, either for want of a sufficient consideration, or for any other cause, such use will remain in the covenantor or bargainor. (a)

35. From the nature of resulting uses, and uses by implication, it follows that they can *never arise to any person but the original owner* of the estate.

36. Husband and wife levied a fine of the wife's estate 375 \* to the \* use of the heirs of the body of the husband on the wife begotten; remainder to the husband in fee. It was resolved, that no estate resulted to the husband, because the lands originally belonged to the wife. This judgment was affirmed by the House of Lords. (b)

37. Where there is any circumstance to show the *intent of the parties* to have been that the *use should not* result, it will remain in the persons to whom the legal estate is limited.

38. A recovery was suffered by one Hummerston, to the intent that the recoverors should make an estate to him and his wife for their lives, remainder to their eldest son in tail, &c. It was agreed by the Court, that after the recovery suffered, the recoverors should be seised to their own use; for if they were seised to the use of Hummerston, then they could not make the estate. But Southcot and Wray said they ought to do this in convenient time, otherwise the use would result to Hummerston. (c)

39. A fine was levied, and an indenture made to declare the uses of it; the words of which were,—“the fine was levied to the intent that they should make an estate to him whom J. E., the father, (who was the cognizor,) should name.” And there was a proviso at the end of the indenture, that the cognizee should not be seised to any other use, except unto that use specified. It was holden by all the justices, that the lands should be to the use of the cognizees themselves, immediately as above; that after the nomination, they should be seised to the use of whomever he named; and if J. E. died without nomination, then the law would settle the use in his heir. (d)

40. A feoffment was made by A upon condition to reconvey to A for life, remainder to the eldest son of A in fee. It was resolved that no use resulted to A; for if so, then the estate

(a) Tit. 32. c. 10.

(b) Davis v. Speed, Show. Ca. in Parl. 104. *Ante*, s. 24.

(c) Hummerston's case, Dyer, 166. a. n. (9.) (337. a. pl. 36.)

(d) (Betman v. Bateston, 4 Leon. 22. Dyer, 166. a. n. (9.)

would vest by the Statute of Uses, and the feoffee could not make an estate to A and to his son. (a)

41. As resulting uses depend upon the *intention* of the parties, *parol evidence is admissible* to show what the intent was;<sup>1</sup> and the clause in the Statute of Frauds, requiring that declarations of trusts and confidences, which is held to include uses, should be made by some writing, signed by the party, extends, in cases of conveyances to uses, to third persons only; not to the persons conveying, or those to whom lands are conveyed to uses. (b)

\*42. Where a use is *expressly limited to the owner* of \*376 the estate, he will *not be allowed to take* any resulting or implied use, *inconsistent with the use* limited to him.

43. At a moot in Lincoln's Inn Hall, Mr. Noy put this difference:—If a man makes a feoffment in fee to the use of himself for life, the fee simple remains in the feoffees, for otherwise he will not have an estate for life, according to his intention; but if the use be limited to himself in tail, it is otherwise; for both estates may be in him. (c)

44. It was held in the Court of Wards by Popham and Anderson, in the argument of the Earl of Bedford's case, that if A makes a feoffment to the use of himself for forty years, and does not limit any other estate, the fee will not result, but will remain in the feoffees; for otherwise the term would be merged. (d)

45. One Savage being seised in fee, conveyed his estate, by lease and release, to trustees and their heirs, to the use of himself for ninety-nine years, remainder to trustees for twenty-five years, remainder to the heirs male of his own body. It was determined that no use for life resulted to Savage, because that would be inconsistent with the term of ninety-nine years expressly limited to him. (e)

46. A, by a settlement made on his marriage, conveyed certain lands to the use of himself for ninety-nine years, if he so

(a) *Winnington's case*, Jenk. Cent. 8 Ca. 44. *Vide Altham v. Anglesey*. *Thrustout v. Peake*, tit. 36. c. 2.

(b) *Roe v. Popham*, 1 Doug. 25. 11 Mod. 214. Tit. 32. c. 3.

(c) *Dyer*, 111. b. n. 46.

(d) (*Dyer*, 111. b. n. 46. 2 And. 197. *Moor*, 718.)

(e) *Adams v. Savage*, 2 Salk. 679.

<sup>1</sup> Provided that, in cases free from fraud, the parol evidence be not inconsistent with the deed. See *post*, tit. 12, c. 1, § 45, note.

long lived, and after to the use of trustees for 200 years, remainder to the use of the heirs male of his own body, remainder to his own right heirs. Upon a case referred to the Judges of the Court of Common Pleas, from the Court of Chancery, they held that no estate of freehold could result to A for his life, because another estate, viz., for ninety-nine years, if he so long lived, was expressly limited to him, which would be inconsistent with a resulting estate of freehold. (a)

47. The doctrine of resulting uses *only extends to those cases where an estate in fee simple passes*; for if a person conveys an estate to another in tail, without any consideration, or declaration of uses, no use will result to the donor, and, consequently, the donee will hold to his own use; because, by a gift of this kind, there is a tenure created between the donor and the donee in tail, which amounts to a consideration, and prevents the use from resulting. In the same manner as if a feoffment had been made before the Statute of *Quia Emptores*, the feoffee would have held the land to his own use, because a tenure was  
377 \* thereby \* created, in consequence of which he would have held of the feoffor, at least by fealty. (b)

48. In the same manner, if a person leases lands to another for life, or years, no use will result to the lessor. So if a lessee for life, or years, grants over his estate, without any declaration of use, the grantee will have it to his own use. In Gilbert's Uses, p. 65, the reason given for this doctrine, is, that these lesser estates were not used to be delivered, to be kept for the future support and provision of the family; therefore the mere act of delivering possession passed a right, without consideration; since there was no presumption, from the use of the country, that these estates were transferred under secret trusts; especially as rents were usually reserved; and they were subject to waste and other forfeitures. (c)

49. In the case of a conveyance of an *estate for life or years, without consideration*, although a use should be declared of part of the estate to the grantee, yet there will be *no resulting use to the grantor*.

50. A, being a tenant for life, granted his estate to B, by fine,

(a) *Rawley v. Holland*, 2 Ab. Eq. 753. 22 Vin. Ab. 188. pl. 11.

(b) Bro. Ab. Feoff. al. Use, pl. 10. Dyer, 146. b. Perk. 534, 5.

(c) Bro. Ab. Feoff. al. Use, pl. 10. Dyer, 146, b. Perk. 534, 5.



and by indenture declared the use to B for the life of A and B; and if B died, living A, that it should remain to C. Afterwards B died, living A; C entered and let to D for years, and died, living A. The question was, whether the lessee should retain the land as an occupant, during the life of A, or that A should have it again as a resulting use. "It was adjudged, after argument, that D should have it as an occupant, and that A had not any residue of the use in him; for although, where tenant in fee makes a deed of feoffment, and limits the use for life or in tail, and doth not speak of the residue, it shall be to the feoffor or conusor, because he had the ancient use in him in fee; yet when tenant for life, or he who hath the particular estate, grants his estate by fine, and limits the use for years, or for a particular estate, it shall not return to him, but be to the conusee, although the fine were without any consideration; because he who hath the particular estate by fine is subject to the ancient rent and forfeiture, which is a sufficient consideration to convey the estate to him." (a)

51. As a *devise* imports a bounty, it follows that it *must be to the use of the devisee, if not otherwise declared*; and that *no use can, in any case, result to the heirs of the devisor, unless it* \* appears by the will itself that the devise was not made \* 378 to the use of the devisee. But if a person be merely named as a devisee to uses, and the use fails, there will be a resulting use to the heir of the devisor. (b)

52. Where a tenant in tail suffered a common recovery of his estate, by which it was converted into a fee simple, without declaring any uses thereof, it has been doubted whether the use which resulted to him be in tail or in fee simple. The language of the old books is, that where there is a feoffment, fine, or recovery, without consideration or declaration of uses, these assurances shall enure to the old uses. (c)

53. Thus, where a father tenant for life, and the son tenant in tail, joined in suffering a common recovery, but the father alone executed the deed declaring the uses; the Court directed the jury to find the uses according to the estates which the parties had at the time of suffering the recovery. (d)

54. So, where a father tenant for life, and the son tenant in

(a) *Castle v. Dod*, Cro. Jac. 200.

(b) Tit. 38. c. 1. *Hartop's case*, 1 Leon. 254.

(c) Tit. 36. c. 7.

(d) *Argol v. Cheney*, Latch, 82. *Harris v. Evans*, Bridg. 548.

tail, suffered a common recovery, without any declaration of the uses to which it should enure; it was held that it enured to the former use. (a)

55. The doctrine laid down in the above cases is liable to great objections; for as resulting uses are guided by the intent of the parties, it follows that where a tenant in tail suffered a recovery without any declaration of uses, the presumption was, that this act was done for the special purpose of acquiring the absolute dominion over his estate; as it cannot be supposed that he would go to the expense of suffering a recovery, if he was only to take the same estate which he had before; and it has been admitted in the following case, that where a tenant in tail suffered a common recovery, without any declaration of uses, the resulting use was to him in fee simple. (b)

56. Earl Ferrers being tenant for life, with remainder to his first and other sons in tail male, and having an eldest son Robert, who was about seventeen years old, and several other sons, a very advantageous match had been agreed on between such eldest son and a young lady; and articles were entered into by Earl Ferrers and his son, whereby Earl Ferrers covenanted that he and his son should, within a year after his son came of age, by fine or recovery, settle the bulk of his estate to the use of his son for life, remainder to his first and other sons in tail, &c. The  
379\* marriage\* took effect, and the eldest son Robert, when he came of age, joined with his father in levying a fine, and suffering a common recovery; but there was no declaration of uses. The son died, leaving an only daughter and no son.

It appears from the case that the estates of which the recovery was suffered, descended to the only daughter of Robert the son, who had joined his father in the recovery, and had not declared any uses. Now, if the recovery had enured, as to Robert the son's estate, to the old uses, he would have been tenant in tail male, with remainder to his brothers in tail male successively; and upon his death without issue male, the estate would have vested in his next brother, not in his daughter. But it was so fully admitted by the counsel of Earl Ferrers, who was party to that suit, and who was a younger brother of Robert the son, who suffered the recovery, that in case of no declaration of uses, the use and estate resulted to Robert the son in fee; that the

(a) *Waker v. Snow*, Palm. 359.

(b) 9 Rep. 11. a. *Gilb. Uses*, 64.

only point for which they contended was, that the articles executed by Robert the son, while an infant, and under which they claimed, amounted to a good declaration of the uses of the recovery. (a)

57. This doctrine has been confirmed by the highest modern authorities. Thus Lord Hardwicke has said,—“ I take it for law that a tenant in tail suffering a recovery is in of the old use, and that the estate is discharged of the Statute *De Donis* ;” and in another case,—“ A common recovery will bar the entail, though there is no deed to lead the uses ; because it is in respect of the satisfaction of estate in value, which creates the bar.” And Lord C. J. Lee has said,—“ It is the use of the fee simple that passes to the recoveror from tenant in tail, and which results to him and his heirs, if no use is declared.” (b)

58. It follows from the above principles, that where a tenant in tail levied a fine, without any declaration of uses, he acquired a base fee descendible to his heirs, as long as he had heirs of his body ; and, in the case of *Roe v. Popham*, it must be presumed that the Court reasoned in this manner ; for upon the death of the tenant in tail without issue, the person who had the reversion in fee was held to be entitled to the estate. (c)

(a) *Nightingale v. Ferrers*, 3 P. Wms. 207. (b) 1 Atk. 9. 3 Atk. 313. 5 T. R. 110. note.

(c) *Ante*, s. 41.

## TITLE XII.

## TRUST.

## BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 20.

KENT'S COMMENTARIES. Vol. IV. Lect. 61.

G. SPENCE, on the Equitable Jurisdiction of the COURT OF CHANCERY. Vol. I.

Part II. Book III. ch. 2—7.

FLINTOFF, on Real Property. Vol. II. Book III. ch. 2, 3.

CH. BARON GILBERT, on Uses and Trusts. (Sugden's ed.)

SANDERS, on USES and TRUSTS. (5th ed.)

R. PRESTON, on ESTATES. Vol. I. p. 184—190.

STORY'S COMMENTARIES on EQUITY JURISPRUDENCE. Vol. II. ch. 24—26,  
29, 32, 33.

CH. FLETCHER. Essay on the ESTATES of TRUSTEES.

THOMAS LEWIN. Treatise on the LAW of TRUSTS and TRUSTEES.

LOMAX'S DIGEST. Vol. I. tit. 10.

## CHAP. I.

## ORIGIN AND NATURE OF TRUST ESTATES.

## CHAP. II.

## RULES BY WHICH TRUST ESTATES OF FREEHOLD ARE GOVERNED.

## CHAP. III.

## RULES BY WHICH TRUST TERMS ARE GOVERNED.

## CHAP. IV.

## ESTATE AND DUTY OF TRUSTEES.

## CHAP. I.

## ORIGIN AND NATURE OF TRUST ESTATES.

SECT. 1. *Origin of Trusts.*

3. *Description of.*

4. *A Use limited upon a Use.*

14. *Limitation to Trustees to pay  
over the Rents.*

16. *Trust for the separate Use of  
a Woman.*

21. *Trust to sell or to raise Money.*

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which a [legal Estate or]  
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34. *A Trust Estate limited after  
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35. *Terms for Years limited in  
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| <p>SECT. 36. <i>How Trusts may be declared.</i><br/>         40. <i>Resulting or implied Trusts.</i><br/>         41. <i>Contract for a Purchase.</i><br/>         42. <i>Purchase in the Name of a Stranger.</i><br/>         48. <i>Purchase with Trust Money.</i><br/>         52. <i>Conveyance without Consideration.</i><br/>         55. <i>A Trust declared in Part.</i><br/>         57. <i>Or which cannot take Effect.</i><br/>         59. <i>Exception.</i><br/>         61. <i>Where no Appointment is made.</i><br/>         62. <i>Renewal of a Lease by a Trustee.</i></p> | <p>SECT. 64. <i>Or by Persons having only a particular Estate.</i><br/>         66. <i>Where there is Fraud.</i><br/>         67. <i>A Purchase in the Name of a Child is an Advancement.</i><br/>         75. <i>Exception. Children emancipated.</i><br/>         77. <i>And also a Wife.</i><br/>         80. <i>No Trust between a Lessor and Lessee.</i><br/>         81. <i>Trusts [executed distinguished from Trusts] executory.</i><br/>         83. <i>Who may be Trustees.</i></p> |
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SECTION 1. The object and intention of the Statute 27 Hen. VIII. certainly was, to destroy that double property in land, which had been introduced into the English law by the invention of uses. If, therefore, the intention of the legislature had been carried into full effect, no use could ever after have existed for more than an instant; for the moment a use was created, the statute would have transferred the legal seisin and possession to such use. But the strict construction which the Judges put on that statute defeated, in a great measure, its effect; as they determined that there were some uses to which the statute did not transfer the possession; so that uses were not entirely abolished, but still continued separate and distinct from the legal estate, and were taken notice of and supported by the Court of Chancery, under the name of Trusts. (a)

2. A *trust* is, therefore, a *use not executed* by the Statute 27 Hen. VIII.; for originally the words *use* and *trust* were perfectly synonymous, and are both mentioned in the statute. But as the provisions of the statute were not deemed coextensive with the various modes of creating uses, such uses as were not provided for by the statute were left to their former jurisdiction. (b)

3. A *trust estate* may be *described*<sup>1</sup> to be a right in equity to take the rents and profits of lands, whereof the legal estate is

(a) Vaugh. 50. 1 Atk. 591.

(b) 1 Black. Rep. 136.

<sup>1</sup> Mr. Willis, adopting the view of Lord Stair, describes a trust as "An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully, according to such confidence." See Stair, Instit. LL. Scotland, (by Brodie,) b. 4, tit. 6, § 2, Vol. II. p. 650; Willis on Trustees, ch. 1, p. 2.

vested in some other person; to compel the person thus seised of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the *cestui que trust*, shall direct, and to defend the title to the land. In the mean time, the *cestui que trust*, when in possession, is considered in a court of law, as tenant at will to the trustee. (a)

4. There are *three direct modes* of creating a trust. The first arises from a rule established in 4 & 5 Phil. & Mary, that a use could not be *limited on a use*.<sup>1</sup> The reason given by Lord Bacon

(a) 1 Show. R. 78.

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<sup>1</sup> This exposition of the statute, first given in Tyrrrel's case, is classed by Blackstone among the "technical scruples which the Judges found it hard to get over;" and he regrets its introduction; observing of this and another rule restricting the operation of the Statute of Uses to freehold estates, that "by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance." 2 Bl. Comm. 336. Ld. Mansfield, speaking of the same rules, said that "it was the absurd narrowness of the courts of law, resting on literal distinctions, which, in a manner, repealed the Statute of Uses, and drove *cestuis que trust* into Equity." 2 Dougl. 744. Ld. Chancellor Sugden, also, is clearly of opinion that the notion that a use could not arise out of a use, so as to be executed by the statute, was merely a technical subtilty, which ought not to have been sanctioned at all. It was a suggestion which greatly perplexed the Judges; see *Milborn v. Ferrers*, Dyer, 114, b.; *Girland v. Sharp*, Cro. El. 382; and in Tyrrrel's case the point evidently was not firmly held by the Court, but was decided with apparent hesitation, and by a mere turn of the scale of opinion. "Upon such authority as this," says the learned Chancellor, "it became, by degrees, a settled point, that a use could not arise out of a use; and it is, at this day, too firmly settled to be even questioned. For, it is said, the use is only a liberty, or authority to take the profits; but two cannot severally take the profits of the same land, therefore there cannot be a use upon a use. *Daw v. Newborough*, Com. 244. And see *Symson v. Turner*, 1 Eq. Ca. Abr. 383. Perhaps, however, there is not another instance in the books in which the intention of an act of parliament has been so little attended to. It has frequently been observed, by high authority, that there is no magic in words. When, therefore, the act said that, where one person was seised to the use of another, the legal estate should be transferred to the *cestui que use*; it meant that the person to whom the estate belonged in conscience should be invested with the legal right to it. Now, if the estate was conveyed to A to the use of B, in trust for C, C was the person entitled to the possession of the estate, and A was evidently seised to his use, as it appeared by the deed itself, that the possession was not intended to remain in B; and there is nothing in the act to prevent the possession vesting in C. And, at least, it might have originally been held without any violation of principle, that the statute first executed the possession in B, and then again in C; for, admitting that it was necessary to first vest the possession in the use limited to B, it would be difficult to discover any thing in the act which prevented the possession given by the statute, from immediately transferring itself from B to C.

for this determination is, because the words of the statute are,—Where any person is seised of any *lands or tenements* to the use of any other person;—which exclude uses, as they do not fall within either of those descriptions. (a)

(a) Tyrrel's case, Dyer, 155. a. Bac. Read. 43. (Wilson v. Cheshire, 1 McCord, Ch. R. 233.)

This could be effected by two deeds, and why not by one and the same deed? Nor am I satisfied that the Judges intended to hold, generally, that a use upon a use was void. They were of opinion, indeed, that if A, in consideration of money paid by B, bargained and sold land to B to hold to him and his heirs, to the use of the feoffee for life, in tail, or in fee, or to the use of a stranger, the uses were void, and B should be seised in fee, *because the consideration and sale implied the use should be solely in him in fee.* See Bendl. p. 61, pl. 108. The limitation was deemed repugnant to the habendum. Tyrrel's case does not go further than this. But suppose it to have been expressed in the bargain and sale, that the money belonged to C, and was paid by B on his behalf, and the habendum had been to B in fee, to the use of C in fee; it does not appear to have been settled that the use to C would not have been executed by the statute, although clearly a use upon a use. The law must, however, at this day, be considered to embrace every case." Gilbert on Uses, by Sugden, p. 348, note.

But whether the rule in Tyrrel's case is to be regarded as a rule of construction in all or any of the United States, may well be doubted. In *South Carolina*, indeed, and in *Illinois* and *Missouri*, the Statute of Uses, 27 Hen. 8, has been expressly enacted in nearly the same words; and as these enactments were long subsequent to that case, those States, in adopting the language of the English statute, may, perhaps, be supposed to have adopted also the expositions it had received in England. But in most of the other American States, statutes have been passed expressly regulating conveyances, and providing in substance that deeds, executed in the prescribed manner, shall be valid to pass the estate to the grantee without any other formality. Such is the case in *Massachusetts*, *Maine*, *New Hampshire*, *Vermont*, *Virginia*, *North Carolina*, *Kentucky*, *Mississippi*, and *Pennsylvania*. Some have gone farther. Thus, in *Delaware*, Rev. St. 1829, p. 89, § 1, it is enacted, in general terms, that the legal estate shall, in all cases, accompany the use and pass with it. In *New York*, Rev. Stat. Vol. II. p. 13, 3d ed., it is declared that the party entitled to the possession and receipt of profits shall be deemed to have the legal estate, to the same extent as the equitable interest. A provision substantially similar exists in *Indiana*, Rev Stat. 1843, ch. 28. And in *Rhode Island*, every deed and covenant to stand seised transfers the possession to the *cestui que use*, without farther ceremony. R. Isl. Rev. Stat. 1844, p. 260. In all these States, therefore, deeds of conveyance derive their effect not from the Statute of Uses, but from their own statutes of conveyances; operating nearly like a feoffment with livery of seisin, to convey the land, and not merely to raise a use to be afterwards executed by the Statute of Uses. Hence it would seem that, in these States, a use may well be limited on a use, and the original intent and principle of the Statute of Uses be allowed to have its free and unrestrained operation, and to convey the legal estate, by its electric energy, to the remotest use, when not arrested by any permanent intervening trust. Such operation has already been admitted in deeds of bargain and sale; and is virtually conceded in the rule, that deeds of conveyance, in whatever form, may be treated as any species of conveyance which will best effectuate the intent of the parties. See *Davis v. Hayden*, 9 Mass. 514; *Higbee v. Rice*,

382\* \*5. Thus, on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, it was held that the statute executed only the first use; and that the second was a mere nullity. But as it was evident that B was not intended to be benefited by that conveyance, the Court of Chancery took cognizance of the case, and decreed that B should pay the rents and profits of the land to C, and execute such conveyances as he should direct. (a)

6. In a settlement, lands were conveyed to trustees and their heirs, to the use of them and their heirs, to the use of A B for life, &c. It was held that the legal estate was vested in the trustees, and that the limitations to A B, &c., were but trusts. (b)

7. Ann Ratford conveyed lands to T B and his heirs, to the use of him and his heirs, in trust to permit the said Ann and her husband to receive the profits during their lives. Lord Talbot held, that as the estate was limited to trustees and their heirs, to the use of them and their heirs, so that it was actually executed in them, whatever came afterwards could be looked upon only as an equitable interest; for there could not be a use upon a use. (c)<sup>1</sup>

8. [In a case of devise, the rule of construction was the same. Thus, where a person devised his real estate to trustees and their heirs, to the use of them and their heirs, upon several trusts; it was declared by Lord Hardwicke that the legal estate was vested in the trustees, and the subsequent devisees took only equitable interests. (d)]

9. Where lands are conveyed by covenant to stand seised, bargain and sale, or by appointment under a power to A and his heirs, to the use of B and his heirs, the legal estate will vest in A; and B will take only a trust or equitable estate; for in each

(a) 2 Bl. Comm. 336. (*Calvert's Lessee v. Eden*, 2 H. & McH. 279.)

(b) *Whetstone v. Bury*, 2 P. Wms. 146, *Wagstaff v. Wagstaff*, tit. 38, c. 5. *Doe v. Passingham*, 6 B. & Cr. 305.

(c) *Att.-Gen. v. Scott*, Forrest R. 138.

(d) *Hopkins v. Hopkins*, 1 Atk. 581. *Marwood v. Darrell*, Ca. Temp. Hardwicke, 91. S. P.

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5 Mass. 352; *Pray v. Pierce*, 7 Mass. 381; *Knox v. Jenks*, 7 Mass. 488; *Flint v. Sheldon*, 13 Mass. 443; *Marshall v. Fisk*, 6 Mass. 24. The rule in *Tyrrel's* case was expressly disapproved by Dana, Ch. J., in *Thatcher v. Omans*, reported in 3 Pick. Suppt. p. 528.

<sup>1</sup> See Cornish on Uses, p. 40, 41; *Moor*, 46, pl. 138.



of these instances, the conveyance does not operate by transmutation of the seisin to A, but merely passes the use to him, the seisin remaining in the bargainor, covenantor, and the releasee, &c., to uses in the instrument creating the power. (*a*)

10. In *Venables v. Morris*, an estate was limited by deed and fine to the use of the husband for life, remainder to trustees and their heirs during his life, to preserve contingent remainders; remainder to the wife for life, remainder to the trustees and their heirs, (generally, without confining the limitation to the life of the wife,) to preserve the contingent uses and estates thereafter \*limited; remainder to such persons, &c., as \*383 the wife should appoint, &c. Upon a case sent by the Court of Chancery, the Court of King's Bench certified that the trustees took the legal estate in fee after the determination of the wife's life estate, and that all the subsequent limitations were trusts. (*b*)

Lord Kenyon observes, upon the above case, that it was absolutely necessary that the trustees should take the legal fee, for the wife in exercise of her power of appointment might create contingent remainders, which would require the estate in the trustees to support them. (*c*)

11. The case of *Doe v. Hicks*, which is one of devise, seems to have overruled *Boteler v. Allington*, and is distinguished from *Venables v. Morris*, in the material circumstance that there was no power of appointment. In *Doe v. Hicks*, the estate was devised to A for life, to trustees and their heirs (generally) to preserve contingent remainders; to the first and other sons of A successively in tail male; then followed limitations to several other tenants for life, to the trustees to preserve, and to the first and other sons in tail male as before, the limitations in every instance being to the trustees and their heirs (generally;) with the ultimate limitation to the right heirs of the testator. The Court of King's Bench held that it was not necessary for the trustees to take the legal fee, and the intention of the testator appeared to be, that the estate limited to the trustees should be confined to the lives of the tenants for life; for if the testator did not intend this, all the subsequent limitations to the trustees were

(*a*) Tit. 32, c. 10, 14. See the Tables, *supra*, p. 368, n.

(*b*) 7 T. R. 342, 438.

(*c*) 7 T. R. 437.

absolutely nugatory, and that the devise ought to be construed accordingly. (a)

12. But it has been decided in *Colmore v. Tyndall*, that in a deed, limitations, nearly resembling those in the above case of *Doe v. Hicks*, do not indicate an intention to give the trustees an estate *pour autre vie* so clearly, as to justify the Court in confining the limitation to the trustees to the lives of the tenants for life. In *Colmore v. Tyndall*, after several limitations in strict settlement, among which, those to the trustees to preserve were confined to the lives of the tenants for life, the estate was limited to Marianne Colmore for life; with a contingent life-estate to her husband in case she married; remainder to the trustee and his

heirs (generally) to preserve; remainder to her first and  
384 \* other \* sons successively in tail male; then to Caroline

Colmore for life, to her husband if she married, to the trustee and his heirs (generally) to preserve; to her first and other sons in tail male as before; with the remainder over in fee. Marianne Colmore died unmarried. The Court of Exchequer Chamber decided that the legal fee vested in the trustees, after the life-estate of Caroline Colmore. (b)

13. But where in a deed, the intention is apparent from the subsequent limitations, in order to give effect to which it becomes necessary to confine the limitation to the trustees during the life of the tenants for life, there such a construction will be adopted. To this principle the case of *Curtis v. Price* must be referred; there the estate was by lease and release limited to the husband for life, to his wife for life, if she continued unmarried, if not, to trustees and their heirs (generally) upon trust to pay her an annuity out of the rents during her life for her separate use, and to apply the surplus for the benefit of the children of the marriage, and after the decease of husband and wife to the trustees, their executors, &c., for a term of one hundred years, for raising portions for younger children, remainder to the heirs of the body of the wife by the husband, remainder to the right heirs of the husband. Sir William Grant, M. R., was of opinion that the limitation to the trustees should be confined to the life of the wife, because the term of one hundred years could not arise consistently with the limitation of the entire fee to the same trustees.] (c)

(a) *Doe v. Hicks*, 7 T. R. 483. *Boteler v. Allington*, 1 Bro. C. C. 72. *Nash v. Coates*, 3 B. & Ald. 839.

(b) *Colmore v. Tyndall*, 2 Yo. & Jerv. 605.

(c) *Curtis v. Price*, 12 Ves. 89.

14. The *second mode of creating a trust*, arose from an opinion delivered by the Judges in 36 Hen. VIII., that where a person made a feoffment in fee, to his own use, during his life, and after his decease, that I. N. should take the profits, this was a use in I. N.; contrary, if he said that after his death his *feoffees should take the profits, and deliver them* to I. N. This would be no use in I. N., because he could have them only by the hand of the feoffees. Thus the feoffees would have the legal estate; and consequently I. N. could only have a trust, which would be enforced in equity. (a)<sup>1</sup>

(a) Bro. Ab. tit. Feoffm. al. Use, 52.

<sup>1</sup> Respecting the estates of trustees, the principal inquiries, at the present day are, *first*, whether the estate conveyed is within the operation of the Statute of Uses; that is, whether the trustee took any estate at all; and, *secondly*, if he did, then what estate did he take.

In regard to conveyances by deed, the first of these questions seldom arises; because, since the Statute of Uses, if the parties intend to make a conveyance in trust, they are generally careful to frame it so as to be clearly out of the reach of the statute. The questions most frequently raised are upon the interpretation of wills. The *first* class of these cases consists of those, in which there is no express devise to trustees, but an intention is more or less apparent of creating a trust of real estate, and of imposing the duty, and with it the estate, upon certain persons. When that intention is clear, an estate in the trustees will be implied, in order to give effect to the testator's intention in this, as in all other cases.

This intention may be uncertain in two ways; either, first, because it does not plainly appear that the trust is intended to attach to the land; or, secondly, because the performance of the duty itself does not necessarily require that the trustee should have an estate in the land. An example of the former kind of uncertainty, was in *Doe v. Woodhouse*, 4 T.R. 89; where the testator willed that his debts and several annuities should be paid by his executors out of his whole estate; and it was decided that these words, being sufficient to include real property, gave his executors an estate, by implication, in the land.

Where the question turns upon the nature of the duty to be performed, a distinction is made between a trust, which carries with it some legal estate or interest in the land, and a bare power or authority to sell; and the rule is, that where the duty to be performed may be sufficiently accomplished by the exercise of a bare power or authority, the will is to be construed as creating nothing more than such power and authority, unless more is expressly given; since, by such construction, the heir is not disinherited. Any subsequent limitations in the will may take effect, subject to this power to sell. *Fletcher on Trustees*, 11, 12.

Thus, where a man devised his tenements to be sold by his executors, it was thought by Lord Coke, and after him by Mr. Hargrave,—*Co. Lit.* 113, a, n. 2,—that an interest passed to them, in trust. But this opinion is now regarded as unsound; and the devise is held to confer only a power to sell. *Sugd. Pow.* 106; 1 *Chance*, *Pow.* 62.

[Trustees under a will, who are authorized to grant and sell the whole or any part of the testator's estate real or personal, with full power to execute any deed or deeds

A distinction has, however, been made between a devise to a person in trust, to *pay over the rents and profits* to another ; and

effectual in law, to pass a complete title thereto, do not take the legal estate therein. *Fay v. Fay*, 1 Cush. 93.]

A second class of doubtful cases is, where there is an express devise to trustees, but it seems to depend upon a contingency which has failed. Here, also, an important distinction is made, viz., between contingent gifts in trust, and gifts upon contingent trusts. Thus, where a testator, in case his personal estate should not suffice to pay his debts, gave all his real estate to his executors in trust, to pay his debts, and to pay the residue over to others, this was held a contingent devise, in trust ; and the personal estate proving sufficient to pay the debts, nothing passed to the executors, because the contingency never happened, on which alone they were to take. But where the testator devised all his lands to his executors, in trust, to pay certain legacies thereout, in case the personal estate was not sufficient, this was an absolute devise, the trust only being contingent, and of course the executors took the estate, at all events. 2 B. & C. 357 ; 3 Dow. & Ry. 764 ; 2 Brod. & B. 623 ; 3 B. & C. 161.

A third class of cases, in which it is doubtful whether the trustee takes any estate or not, is where the devise itself is express and unconditional, but such uses or trusts are also declared, as may possibly be executed by the Statute of Uses, so as to take the estate immediately out of the trustee and vest it in the *cestui que trust*.

Here it is a well settled principle, that the estates of devisees in trust, are not to be taken from them by the execution of uses, contrary to the intentions of the testator ; and the question, therefore, is, whether the will itself affords sufficient evidence of the testator's intention, that the estate of the trustees should remain in them. *Fletcher on Trustees*, 19.

This intent may be manifested by requiring the trustees to perform some act, either, 1st, not relating to the ulterior gift, but subject to which act or duty others are to have the benefit of the estate,—see 1 Eden, 125,—or 2d, relating to the estate itself and the manner in which the *cestui que trust* is to enjoy the benefit of it.

Thus, where a trust, and not a mere power to sell, is plainly created ; or a devise is made in trust to raise money, to be applied to collateral purposes, with remainder to the use of the *cestui que trust* ; it is manifest that the testator intended that the estate should vest in the trustee. *Bagshaw v. Spencer*, 1 Ves. Sen. 142. And, though the trust for sale is limited to arise on a contingency which may not happen, yet, if it may happen, the legal estate will be held to be executed in the trustees, from the beginning. *Rogers v. Gibson*, Ambl. 95.

Where money is to be raised out of lands, for the payment of debts or legacies, it sometimes becomes a question, whether it is a devise in trust, or a mere charge upon the lands in the hands of the residuary devisee. This difficulty is settled, by considering whether the testator intended that the trustee or executor should be active in the payment of the money, or not. If such intent does not appear, the Judges of C. B. thought that the legal estate would not vest in the trustee, but that the estate would be executed in the devisee, charged with the payment of the money. *Kenrick v. Ld. Beauclerk*, 3 B. & P. 175.

And it may be stated, generally, that “ where trustees are directed to do any acts relating to the land devised, which are usually performed by the legal tenant, the testator's intention will be taken to be that they are to retain the legal estate ; and, accordingly, it will not be executed in the *cestui que trust*.” *Fletcher on Trustees*, 27.

a devise to a person, in trust to *permit another to receive* the rents and profits. In the former case it was held that the legal estate

• Then, as to those cases where the intent is to be collected from the manner in which the *cestui que trust* is to enjoy the estate; the principle is very broadly stated in *Gregory v. Henderson*, 4 Taunt. 772, that, "though an estate be devised to A and his heirs to the use of B and his heirs, the Courts will not hold it a use executed, unless it appear that the testator intended it should be executed." These last words are material, and without them the proposition would not hold true. But how is the intent to be ascertained, if nothing more appears in the will, than the devise, in those terms? Clearly, by referring to another and well settled rule of interpretation; that "where a testator uses technical words, he must be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary." 2 Pow. Dev. by Jarm. 8; 2 Co. Litt. 271 b, n. 1, sec. 3, p. 5. Accordingly, such a devise would be held to convey a legal estate to B, the *cestui que trust*, and his heirs, by the operation of the statute. *Broughton v. Langley*, 2 Salk. 679; 2 Ld. Raym. 873; *Fletcher on Trustees*, 30; *Doe v. Collier*, 11 East, 377.

A devise of a freehold estate, in trust, to permit another to receive the rents and profits, is executed by the statute. So held in *Broughton v. Langley*, 2 Salk. 679, per Holt, C. J. And though Sir J. Mansfield, C. J., in *Doe v. Biggs*, 2 Taunt. 109, expressed strong disapprobation of this rule, inquiring how a man could be said to permit, who had, or was intended to have, no power to prevent; yet his objection is deemed untenable, as it is founded on the popular and not the legal meaning of the words. *Kinch v. Ward*, 2 Sim. & Stu. 409, per Sir J. Leach, Vice-Chan.

The words, use, trust, and permit to receive profits, have all the same legal effect; and where they *alone* are employed, without other qualifying expressions, evincive of a different intention, they give the legal estate to the person beneficially interested.

But where the *cestui que trust* is a married woman, and it is apparent that the testator intended a benefit to her alone, and not to her husband, this circumstance is sufficient to vest the legal estate in the trustee, since otherwise the intent of the testator will be defeated. *Say & Sele v. Jones*, 1 Eq. Ca. Ab. 383; 3 Bro. P. C. 113; *Infra*, sec. 16; *Fletcher on Trustees*, 36—41.

So, it was holden as early as 36 Hen. 8, that a trust to receive the rents and profits of real estate, and pay them over to another, was not a trust which the statute would execute. And it makes no difference whether such trust is created by deed or by will. *Supra*, § 14. [But such a trust is valid under the New York Statute (1 Rev. St. 728, § 55, sub. 3,) authorizing the creation of trusts to receive the rents and profits of lands and "apply them to the use" of any person. *Leggett v. Perkins*, 2 Comst. 297. There were dissenting opinions in this case. A conveyance of real estate in trust is void under that statute, unless it provides that the trustees shall receive and apply the rents and profits thereof to the use of some person. *Jarvis v. Babcock*, 5 Barb. Sup. Ct. 139. See, also, *Campbell v. Low*, 9 Ib. 585.]

So where lands are devised to a trustee, in trust, to convey them to the objects of the testator's bounty, or to settle them on another, or to mortgage or let them, a legal estate is held to be vested in the trustee, commensurate, at least, with the interest which he must necessarily convey, in execution of the trust. *Fearne's Cas. and Opin.* 421, 422; per Sir W. Grant, M. R., in *Mott v. Buxton*, 7 Ves. 201; *Leonard v. Sussex*, 2 Verm. 526; *Chapman v. Blissett*, *Cas. Temp. Talbot*, 145, 150, cases in note (f.)

Having thus briefly disposed of the *first* general inquiry, made in regard to trustees,—namely, whether they have any estate at all in the lands; we will now state a few

should continue in the first devisee, in order that he  
385 \* might \* be able to perform the trust; for where he is

principles in relation to the *other* question,—namely, what is the nature or quantity of the estate, where any has passed?

It is obvious that if the trustee is to do any act, he ought to have sufficient power to perform it. Hence the general rule has been established, which was recognized by Lord Ellenborough in *Trent v. Hanning*, 7 East, 99, that “trustees must, in all cases, be presumed to take an estate commensurate with the charges or duties imposed on them.” See also *Doe v. Willan*, 2 B. & Ald. 84; *Gibson v. Montfort*, 1 Ves. sen. 405. Therefore, where lands are devised for a particular purpose, without words of inheritance, and the death of the devisee may defeat the object of the devise, he will take a fee. This doctrine is frequently applied to trusts created to support estates of inheritance. 8 Vin. Abr. 262, pl. 18, cites *Shaw v. Wright*, in 1 Eq. Ca. Abr. 176, pl. 8. [Where land is devised to trustees, they will take the legal estate wherever it is necessary in order to effect the purposes of the trust; but if they be not required to do an act, or exercise any control over the land or the income, the legal estate will vest in the *cestui que trust*. *Upham v. Varney*, 15 N. H. 462; *Ward v. Amory*, 1 Curtis, Ct. Ct. R. 419; *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Met. 35; *Gould v. Lamb*, 11 Ib. 84; *Brooks v. Jones*, Ib. 191; *Cleveland v. Hallett*, 6 Cush. 403; *King v. Parker*, 9 Ib. 71; *Norton v. Norton*, 2 Sandf. Sup. Ct. 296; *Williams v. First P. Soc. in Cin.*, 1 Ohio State R. 478. And where a conveyance of land was made to “A, as he is trustee of B,” the nature of the estate may be ascertained by reference to the will creating the trust, although the will is not referred to in the deed. *Cleveland v. Hallett*, 6 Cush. 403.]

On the other hand, trustees must not in general be allowed, by mere construction or implication, to take a greater estate than the nature of the trust demands; for this would disinherit the heir, which is always, as far as possible, to be avoided, and may also defeat the ulterior limitations in the will. Per Heath, J., in *Doe v. Barthrop*, 5 Taunt. 385; per Lord Ellenborough, in *Doe v. Simpson*, 3 East, 171, 172.

It must, however, be observed, that the rule recognized by Lord Ellenborough, in *Trent v. Hanning*, is not an independent principle of construction. It is merely the governing principle in all cases of doubt, where the intention of the testator is not expressed as to the nature or quantity of estate which he intends to convey, but only as to the final purposes and objects to be obtained by the devise itself. For wherever, from the face of the will, it is apparent that the testator meant to give a fee to the trustees, they will take a fee, although the purposes of the trust might have been effected by the grant of a lesser estate.

Thus, a trust for sale is considered as necessarily extending over the whole estate or interest of the testator in the lands directed to be sold; so that where he has a fee simple, a freehold for life, or the like, they will take the same estate; and this, whether words of inheritance be used, or not; and whether the trust for sale be expressly declared, or raised by implication of law. *Loveacres v. Blight*, Cowp. 352. So, if the trust is to mortgage lands, or to convey them in fee, or to serve perpetual uses, or to make leases indefinitely, the trustee will be understood to take a fee, since this quantity of estate will be required, to perform the trusts. *Bagshaw v. Spencer*, 1 Ves. sen. 142; *Wright v. Pearson*, Amb. 358; 1 Fearn. Cont. Rem. 187, (93) S. C.; 1 Eden, 119. But if a lesser estate be *expressly* limited, however inadequate it may be to carry the trusts into complete effect, the trustee cannot take a greater estate by implication. The

directed to pay over the rents and profits, he must necessarily receive them;<sup>1</sup> but in the latter case it has been adjudged that the legal estate is vested, by the statute, in the person who is to receive the rents.

15. Lands were devised to trustees and their heirs, to the intent to permit A to receive the rents for his life, &c. It was determined that this would have been a plain trust at common law; and what at common law was a trust of a freehold was

course in such cases is to apply to the legislature for power to carry the trust into effect. *Warter v. Hutchinson*, 1 B. & C. 721, 747.

Where a devise is without words of limitation, in trust to raise a gross sum of money out of the annual rents and profits of lands, the trustees are understood to take a chattel interest in the lands, determinable at such time as they might, by ordinary care and diligence, have raised the money. But it is said, that if lands be limited by deed, to hold for the payment of debts, or of such legacies as the grantor may give by his will, the grantee would take a freehold conditional, determinable on the receipt of sufficient moneys out of the land, for the purposes of the grant. *Cordal's case*, Cro. Eliz. 316.

It is also to be noted that the chattel interest thus taken by the trustee, will still be held of uncertain duration, though the lands be of certain annual value, and the sum to be raised is expressly stated in the will. Co. Litt. 42, a.

But it is only where the money is to be raised by the annual profits, that a chattel interest is taken. If it is to be raised by sale, a fee is implied, as has been already remarked.

If the trustees are directed to receive and apply the profits of land for a limited time only, and there is no express limitation of their estate, they are presumed to take the legal estate for that period of time, and no longer.

Thus, where lands were devised to trustees, in trust for an infant till he should be twenty-one, and then to his use, it was held that they took only a term, for as many years as would elapse till his coming of age. *Goodtitle v. Whitby*, 1 Burr. 228. But if they were directed to convey to him, upon his coming of age, then, upon the principles before stated, they would necessarily take a fee. *Doe v. Field*, 2 B. & Ad. 564; *Stanley v. Stanley*, 16 Ves. 491, 505.

These, and similar cases, are all determined by the will of the testator. If his object can be effected, by allowing the Statute of Uses its full operation, and vesting the estate immediately in the objects of his bounty, it is so done, provided he has not expressed a different intention. If he has designated any duty to be actively performed by the trustee, in relation to the land, and has not declared the nature of the estate which the trustee is to take, the law declares it for him, by presuming he intended to grant an estate just sufficient to effect his ulterior purpose, and no more. But if he has expressly limited the estate to be taken by the trustee, the law merely sanctions the intent so expressed, and aids the trustee in performing the trust, only so far as the testator has enabled him to perform it.

<sup>1</sup> But where a devise was made to trustees "to hold to the use and benefit, and to apply the rents, issues, and profits to each and for each," &c.; it was held that such devise was executed by the Statute of Uses, notwithstanding the word "apply." *Laurens v. Jenney*, 1 Speers, 356.

executed by the statute ; which mentioned the word trust, as well as use. And that the case of *Burchett v. Durdant*, which had been determined otherwise, was not law. (a)

16. Where an estate is devised to trustees, *for the separate use of a married woman* ; the Courts will, if possible, construe the devise so as to vest the *legal estate in the trustees* ; because such a construction will best effectuate the intention of the testator.

17. Lands were devised to trustees and their heirs, in trust for a married woman and her heirs ; and that the trustees should from time to time pay and dispose of the rents to the said married woman for her separate use. The Court held it to be a trust only, and not a use executed by the statute. (b)

18. A testator gave all the rents of certain lands to a married woman, during her life ; to be paid by his executors into her own hands, without the intermeddling of her husband. Lord Chief Justice Holt was of opinion that the executors took the legal estate as trustees for the wife ; but the other Judges were of a contrary opinion. Lord Holt's opinion was, however, fully established in the following case. (c)

19. Lands were devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus rents into the proper hands of a married woman ; and after her decease, that the trustees should stand seised to the use of the heirs of her body. It was decreed, that this was a use executed in the trustees during the life of the married woman ; but that after her decease, the legal estate vested in the heirs of her body. This decree was affirmed by the House of Lords, after consulting the Judges. (d)

20. In the preceding case, the direction to the trustees to pay annuities, and the trust to pay the surplus, would have justified the decree. But in a modern case sent out of Chancery, an estate was devised to trustees and their heirs, upon trust  
386 \* to \* permit the testator's niece, who was married, to receive the rents during her life, for her separate use. Lord Kenyon said, that whether this were a use executed in the trustees or not, must depend upon the intention of the devisor.

(a) *Broughton v. Langley*, 2 Ld. Raym. 873. (2 Salk. 679.) *Doe v. Biggs*, 2 Taunt. 109. (*Kinch v. Ward*, 2 Sim. & Stu. 409.) 2 Vent. 312.

(b) *Nevil v. Saunders*, 1 Vern. 415.

(c) *South v. Alleyne*, 5 Mod. 101. 1 Salk. 228.

(d) *Say & Sele v. Jones*, 1 Ab. Eq. 383. 3 Bro. Parl. Ca. 113.



This provision was made to secure to a feme covert a separate allowance, to effectuate which it was essentially necessary that the trustees should take the estate, with the use executed; for otherwise the husband would be entitled to receive the profits, and so defeat the object of the devisor. The Court certified that the legal estate, by way of use executed in fee simple, vested in the trustees; that construction being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the feme covert. (a)<sup>1</sup>

21. Where lands are devised to trustees *in trust to sell* or mortgage them, in order to *raise money* for payment of debts, and subject thereto in trust for a third person, *the trustees will take the legal estate*; for otherwise it would not be in their power to execute the trust.

22. A person devised all his lands to five trustees, their heirs and assigns, in trust that they and their heirs should in the first place, by the rents and profits, or by sale or mortgage of the premises, raise so much money as should be necessary for the payment of his debts; after payment thereof, he gave the same to his trustees for 500 years, without impeachment of waste, upon several trusts; and then proceeded in these words: "And from and after the determination of the said estate for years, then I give and devise all my said lands, &c., unto my said trustees, their heirs and assigns; my mind being, that my said trustees, shall be and stand seised of the said premises in trust for the several uses, &c., after declared; viz. as for one moiety of the same premises I give and devise the same to the use and behoof of my nephew T. Bagshaw, for the term of his natural life," &c. One of the questions in this case was, whether the estate devised to the nephew was a legal or a trust estate. Lord Hardwicke held that the devise to the nephew was merely a trust in equity;

(a) *Harton v. Harton*, 7 Term R. 652. See 2 Swan. 391, per Lord Eldon. (*Nevil v. Saunders*, 1 Vern. 415. *South v. Alleyne*, 5 Mod. 101. 1 Salk. 228, S. C. *Bush v. Allen*, 5 Mod. 63.)

<sup>1</sup> So, where real and personal estate was devised in trust for the equal use and benefit of the testator's four sisters and their heirs forever, to be managed as the trustees should think most for the interest of each of the parties, two of the sisters being femes covert; it was held that the legal title remained in the trustees, it being necessary, in order to enable them to manage the property as they might think most conducive to the interest of the *cestuis que trust*, according to the intent of the testator. *Bass v. Scott*, 2 Leigh. R. 256.

the first devise being to the trustees and their heirs, it carried the whole fee in point of law. Part of their trust was to sell the whole or a sufficient part for payment of debts. This 387 \* would have carried a fee by construction without \* the word heirs. The consequence of this was, that here being the whole fee, in law, devised to the trustees, no remainder of a legal estate could be limited upon it; and T. Bagshaw took only a trust. (a)

23. This mode of construction is *adopted in cases of deeds*, as well as in that of devises.

24. Lord Byron being tenant for life, with remainder to his son in tail, they suffered recoveries, and conveyed estates in Lancashire and Nottinghamshire to the use of trustees and their heirs, in trust to sell the Nottinghamshire estate for payment of debts. As to the Lancashire estate, in trust to sell it, and to apply the money in the purchase of other lands, to be settled on Lord Byron for life, remainder to his son in fee; with a proviso that the rents should, till sale, be received by the persons who would have been entitled to them, if no recovery had been suffered; it was held that the use of the Lancashire estate was executed in the trustees: that as to the proviso that the rents, till sale, should be received as before, that was nothing more than the common provision in such cases, and did not carry the legal estate. (b)

25. It is now settled that where an estate is devised to one, for the benefit of another, the Courts will execute the use in the first or second devisee, as appears best to suit the intention of the testator; from which it follows that whenever an estate is *devised to trustees*, with a requisition *to do any act, to which the seisin and possession of the legal estate are necessary*, although they be directed to permit the rents and profits to be received by another person, still that person will only be entitled to a trust estate; for otherwise the trustees would not be able to execute the trust.<sup>1</sup> (c)

26. J. B. devised all his real and personal estate to three

(a) Bagshaw v. Spencer, 1 Ves. 142. Collect. Jur. vol. 1. 378. Wright v. Pearson, Fearne, Cont. Rem. 187. 1 Eden, 119.

(b) Keene v. Deardon, 8 East, 248.

(c) Fearne's Op. 422.

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<sup>1</sup> See, accordingly, Tenny v. Moody, 3 Bing. 3; Shapland v. Smith, 1 Bro. Ch. Cas. 75, Perkins's ed.

trustees, their heirs and assigns, in trust to pay his son Isaac £37 quarterly; and if he married with consent, then double the sum: if he should have any children, he gave the residue of the rents of his said trust estate, to be applied, during the life of his son, for the education of such child or children: he then gave one moiety of the trust estate to such child or children of his son as he should leave, and the other moiety to the child or children of his grandson J. D. \* Lord Talbot said, the \* 388 whole depended on the testator's intent, as to the continuance of the estate devised to the trustees; whether he intended the whole legal estate to continue in them, or whether only for a particular time or purpose. If an estate were limited to A and his heirs, in trust for B and his heirs, there it is executed in B and his heirs. But where particular things are to be done by the trustees; as in this case, the several payments that were to be made to the several persons; it was necessary that the estate should remain in them, so long at least as those particular purposes require it. (a)

27. Lands were devised to trustees, upon trust that they should, every year, after deducting rates, taxes, repairs, and expenses, pay such clear sum as should remain to A B. Lord Thurlow held that the trustees, being to pay the taxes and repairs, must have an interest in the premises; therefore that the legal estate was vested in them. (b)

28. A person devised lands to trustees and their heirs, upon trust to take and receive the rents and profits thereof, and to apply the same for the subsistence and maintenance of his son, during his life. It was determined that the son had only a trust. (c)

29. In the case of a *devise to trustees for particular purposes*, the Courts will consider the *legal estate as vested in the trustees, as long* as the execution of the trust requires it, and no longer; and will therefore, as soon as the trusts are satisfied, consider the legal estate as vested in the persons who are beneficially entitled to it.<sup>1</sup>

(a) *Chapman v. Blisset*, Forrest, R. 145.

(b) *Shapland v. Smith*, 1 Bro. C. C. 75. *Fearne's Op.* 421. *Vide* 2 *Cox's Rep.* 145.

(c) *Silvester v. Wilson*, 2 Term R. 444.

<sup>1</sup> In *New York*, it is expressly enacted, that, "When the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall

30. Thus, in the case of *Say and Seele v. Jones*, the legal estate was held to be vested in the trustees during the life of the married woman. But upon her decease, it was considered as vested in the heirs of her body. (a)

31. So, where a person devised to trustees all his real estates, arrears of rent, and a bond and judgment; in trust, out of the rents and profits and arrears due, to pay an annuity of £50 to his sister H. for her life, and another annuity of £50 to his sister D. for life; after payment thereof, then in trust, out of the residue of the rents, to pay to his brother and nephew £800 in trust for the benefit of the children of another brother. After payment of the annuities, and the sum of £800, he devised his estates to his brother W. for life, &c. The testator further \* gave the trustees a power to grant building and other leases. It was resolved, that the trustees took the legal estate for the lives of the annuitants; with such a term for years in remainder as was necessary to raise the £800; and that,

(a) *Ante*, s. 19.

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also cease." Rev. St. Vol. II. p. 15, § 67, 3d ed. In such case the *cestui que trust* may maintain ejectment in his own name, without any previous conveyance from the trustee. *Welch v. Allen*, 21 Wend. 147. [*Selden v. Vermilyea*, 3 Coms. 525.]

The doctrine in the text, however, has been subsequently limited and restricted to cases not inconsistent with the language and intent of the maker. In a recent case, the rule, as now understood, was thus stated by Lord Denman:—"As to the determination of the trust estate, I do not mean to throw doubt upon the cases on that subject; but the language used in some of them goes too far, when it suggests that, if lands be devised in trust for particular purposes, the estate of the trustee ceases on performance of the trusts, or when they can no longer be performed, in whatever terms the devise may have been framed. *Holroyd, J.*, said rightly—(see *Doe dem. Player v. Nicholls*, 1 B. & C. 344)—that, where there are no words in the will which give the trustees any estate beyond the time during which the trust is to be performed, there the case falls within the general rule, that a trust estate is not to continue beyond the period required by the purposes of the trust. And that must mean a restricted period, and not any length of time during which it may be said that the trusts are in a course of performance. In *Doe dem. Shelley v. Edlin*, 4 A. & E. 582, 589,—[his lordship here observed that, although the observations delivered by the lord chief justice in that judgment are made in the first person singular, it was the judgment of all the judges who heard the case, and was drawn up by Mr. Justice Littledale,]—and *Doe dem. Cadogan v. Ewart*, 7 A. & E. 636, 666, this Court narrowed the rule, of holding the trust estate to determine after the time for performance of the trusts, in the manner which I now suggest as the proper one,—namely, to the case in which that restriction is consistent with the words of the instrument, and the apparent intention of the maker." See *Doe v. Davies*, 1 Ad. & El. 437, N. S.

subject thereto, the limitation for life to W. took effect as a legal limitation. (a)

32. But where lands are devised to trustees, *charged with the payment of debts*, upon trust for a third person, the trustees will not take the legal estate.

33. A person devised his real estates, and also his personal estate, to trustees and their heirs, to the intent that they should, in the first place, apply his personal estate in payment of his debts; and as to his real estates, subject to his debts, he devised the same to R. P. for and during his life, &c.

The Court of Common Pleas held that this was a mere devise charged with the payment of debts; for it did not appear that the testator intended the trustees should be active in paying the debts. It would be more convenient that the legal estate should be vested in the trustees: but this was only an argument *ab inconvenienti*, from which they could not construe the testator to have said, what in fact he had not said. (b)<sup>1</sup>

34. Where an estate is conveyed or devised to trustees and their heirs, *upon trust to pay debts* generally, or debts particularly specified, and *after payment of such debts, in trust for A B*, or in trust to convey such parts of the premises to A B as shall remain unsold; A B has an *immediate trust estate* in the surplus, upon the execution of the deed, or the death of the testator. For in cases of this kind, the payment of the debts is not a condition precedent, which must be performed before the subsequent limitation or devise can take effect; but an interest commencing at the same time, and concurrent with the estate given to the trustees. Because the words, “after payment of debts,” or “when the debts are paid,” only denote the order or course in which the several interests shall take place, in point of actual possession and perception of profits; without preventing the subsequent estates, whether legal or equitable, from being vested in interest, at the same time with those which are prior to them in point of limitation. (c)<sup>2</sup>

(a) *Doe v. Simpson*, 5 East, 162. *Doe v. Timins*, 1 Barn. & Ald. 530. *Doe v. Barthrop*, 5 Taunt. 383. *Doe v. Nicholls*, 1 B. & C. 336. \*

(b) *Kenrick v. Beauchlerck*, 3 Bos. & Pull. 175.

(c) *Collect. Jur.* vol. 1. 214. *Tit.* 36. c. 8.

<sup>1</sup> See *Grégory v. Henderson*, 4 Taunt. 772; *Shapland v. Smith*, 1 Bro. Ch. Cas. 75, and notes by Eden; 1 Sugd. on Vend. 309—314.

<sup>2</sup> It is said that as the Statute of Uses, in *Virginia*, speaks only of uses raised by

35. The *third mode of creating a trust estate* arises from the answer of all the Judges in 22 Eliz. upon a question put:  
 390\* to them \*by the Lord Chancellor, that where *a term for years* was granted to A, to the use of, or in trust for B, the legal estate in the term remained in A, and was not executed in B by the Statute of Uses. For the words of the statute were:—  
 “Where any person is *seised* to the use of another.”<sup>1</sup> Whereas in this case, A is not seised, not having a freehold, but is only possessed of the term, the word *seised* being only applicable to a freehold estate; so that in cases of this kind, the person to whose use the term was declared, was driven into the Court of Chancery; where the trustee was compelled to account with him for the rents and profits of the term, and to assign it to him when required. (a)†

36. By the statute 29 Cha. II. c. 3, s. 7, it is enacted, “That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be *manifested and proved by some writing*,‡ signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void, and of none effect.”

37. A *declaration of trust requires no particular form*,|| provided it must be proved or manifested in writing; therefore *a letter from a trustee*, disclosing the trust, will be sufficient. And in a modern case Lord Alvanley, M. R., said it was not required by the statute that a trust should be created by writing; for the words of the statute were very particular in the clause respecting

(a) Dyer, 369. a. Bac. Read. 42. Tit. 8. c. 1.

deed, those created by devise are not, in any case, executed by the statute, but remain trusts, as at common law. See *ante*, tit. 11, ch. 3, § 3, note; 1 Lomax's Digest, 188, 196, where this opinion is controverted by the latter author.

<sup>1</sup> As the statute of *Virginia* avoids the use of the word “*seised*,” it has been held to embrace terms for years;—1 Tucker's Comm. pt. 2, p. 251; *Tabb v. Baird*, 3 Call, 482;—an opinion which is ably controverted by Judge Lomax. 1 Lomax, Dig. 196, 197.

[† There may be a trust of a rent, as well as of land; of which an account will be given in Title 28.]

[‡ See *Leman v. Whitley*, 4 Russ. 423.]

[|| In *Weaver v. Maule*, 2 Russ. & M. 97, it was decided, that where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.]

declarations of trust. It did not by any means require that all trusts should be created only by writing; but that they should be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving that there was such a trust. Therefore, unquestionably it was not necessarily to be created by writing, but it must be evidenced by writing; then the statute was complied with, and the great danger of parol declarations, against which the statute was intended to guard, was entirely taken away; it must, however, be proved *in toto*, not only that there was a trust, but what it was. (a)<sup>1</sup>

38. \* Where a trust is *confessed in an answer in Chan-* \*391  
*cery*, it will be sufficient.

39. A in consideration of £80, conveyed land to B absolutely. A brought a bill to redeem. B by his answer insisted that the conveyance was absolute; but confessed, that after the £80 was paid with interest, it was to be in trust for the plaintiff's wife and children. This was held to be a sufficient declaration of trust. (b)

40. Besides the above-mentioned direct modes of creating

(a) Forster v. Hale, 3 Ves. 696. (Movan v. Hays, 1 Johns. Ch. 342. Jackson v. Moore, 6 Cowen, 706. Johnson v. Ronald, 4 Munf. 77.) 12 Ves. 74.

(b) Hampton v. Spencer, 2 Vern. 288. Cottington v. Fletcher, 2 Atk. 155.

<sup>1</sup> The statute will be satisfied, if the evidence be in writing, under the hand of the trustee, however informal, and however long subsequent to the creation of the estate. Thus, a letter, signed by the trustee, together with a paper therein referred to, though not signed, have been held sufficient. Forster v. Hale, 3 Ves. 696; Tawney v. Crowther, 3 Bro. Ch. Cas. 161, 318, (and notes by Perkins,) expounded in 3 Ves. 713; Steere v. Steere, 5 Johns. Ch. 1. So, if acknowledged in the trustee's answer in Chancery; Hampton v. Spencer, 2 Vern. 288; Nab v. Nab, 10 Mod. 404; Ryall v. Ryall, 1 Atk. 59, per Ld. Hardwicke; Cottington v. Fletcher, 2 Atk. 255; Fisher v. Fields, 10 Johns. 495; or, in the recitals in his deed. Deg v. Deg, 2 P. Wms. 412. But it must appear on the face of the writings that they relate to the subject-matter; and they must disclose the precise nature of the trust, or Chancery will not execute it. 3 Ves. 707, per Ld. Alvanley. The evidence, moreover, must all be in writing, without resorting to parol evidence, even to connect different writings together. Boyde v. Drummond, 11 East, 142; Abeel v. Radcliff, 13 Johns. 297; Freeport v. Bartol, 3 Greenl. 340. See 1 Greenl. on Evid. § 266, 268; Roberts on Frauds, p. 101, 102; Barrell v. Joy, 16 Mass. 221; Rutledge v. Smith, 1 McCord, Ch. R. 119; Arms v. Ashley, 4 Pick. 71; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 274. The Statute of Frauds, in North Carolina, Rev. St. 1836, ch. 50, contains no provision as to declarations of trust; which, therefore, stand as at common law, and may be proved by parol. Foy v. Foy, 2 Hayw. 131; 4 Kent, Comm. 305, n.; Lewin on Trusts, p. 30, 31; [Philbrook v. Delano, 29 Maine (16 Shep.) 410; Cleveland v. Hallet, 6 Cush. 403; Rathbun v. Rathbun, 6 Barb. Sup. Ct. 481; Duke of Cumberland v. Graves, 9 Ib. 595.]

Trust estates, there are several other cases where trusts arise from the evident intention of the parties, and the nature of the transaction; which are enforced in equity, and usually called *resulting trusts*, or *trusts by implication*. These are expressly saved by a clause in the Statute of Frauds, 29 Cha. II. c. 3, s. 8, by which it is provided: "That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise, or result by implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made." And it has been held by Lord Cowper that this clause must relate to trusts and equitable interests; not to a use, which is now a legal estate. (a)

41. Where a *contract* is entered into for the purchase of a real estate, a trust immediately results to the purchaser; the vendor becomes a trustee for him till a conveyance of the legal estate is made; and the interest of the vendor becomes personalty, consisting merely of a right to the purchase-money. (b)<sup>1</sup>

42. Where an estate is *purchased in the name of one person*, and the *consideration* is given or *paid by another*, there is a resulting trust in favor of the person who gave or paid the consideration. (c)<sup>2</sup>

(a) 1 P. Wms. 112.

(b) 1 Cha. Ca. 39. 9 Mod. 78. Ripley v. Waterworth, 7 Ves. 425. (Waddington v. Banks, 1 Brock. 97. 6 Leigh. 185.)

(c) (Dyer v. Dyer, 2 Cox, 92, 93.)

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[<sup>1</sup> Astor v. L'Amoreux, 4 Sandf. Sup. Ct. 524; Bowie v. Berry, 3 Md. Ch. Decis. 547.] But if one contracts for the conveyance of lands to him on the payment of certain sums of money at specified times, no trust results in his favor by the payment of any money, unless the whole purchase-money is paid. Comer v. Lewis, 4 Shepl. 268. [The whole or part of the consideration must be paid before a trust results. Stephenson v. Thompson, 13 Ill. 186, 221, 227.]

<sup>2</sup> Lands purchased by executors, with the money of the estate, are held by them in trust for the heirs. Wallace v. Duffield, 2 S. & R. 521. If purchased with the funds of a corporation, by its agents, in their own names, it is in trust for the corporation. Methodist Church v. Wood, 5 Ham. 283. If the purchaser from an executor obtains a conveyance of more land than he is entitled to, through the mistake or fraud of the executor, and without payment, he holds the surplus, in trust, for the persons beneficially interested. Anderson v. Nesbit, 2 Rawle, 114. And see Ensley v. Balentine, 4 Humph. 233; [Lounsbury v. Purdy, 16 Barb. Sup. Ct. 376; Work v. Work, 14 Penn. (2 Harris,) 316; Creed v. Lancaster Bank, 1 Ohio State R. 1; Williams v. Brown, 14 Ill. 200; 14 Ibid. 94; Russell v. Lode, 1 Iowa, 566; Tarpley v. Poage, 2 Tex. 139;



43. Thus it was resolved by the Court of Chancery in 35 Cha. II. that where a man bought land in another's name, and paid the money, it would be a trust for him who paid the money, though no deed declaring the trust; for the statute 29 Cha. II. did not extend to trusts raised by operation of law. (a)

44. Lord Hardwicke has said, that where a purchase is made, the purchase money being paid by one, and the conveyance taken in the name of another, there was a resulting trust for the \*person who paid the consideration. This was \*392 where the whole consideration moved from such person. But he never knew it, where the consideration moved from several persons; for that would introduce all the mischiefs which the Statute of Frauds was intended to prevent.<sup>1</sup> Suppose sev-

(a) Anon. 2 Vent. 361. 1 Vern. 109. 2 Atk. 71, 150. (Foote v. Colvin, 3 Johns. 216. Jackson v. Sternbergh, 1 Johns. Cas. 153. Jackson v. Morse, 16 Johns. 197. German v. Gabbold, 3 Binn. 302. Jackson v. Matsdorf, 11 Johns. 91.)

Long v. Steiger, 8 Ibid. 460. Where a deed was taken in the name of the son, and the purchase-money was paid by him and his father, but the proportion which each paid was uncertain, the Court refused to establish a resulting trust in favor of the father. Baker v. Vining, 30 Maine, 17 Shepl. 121; Harper v. Phelps, 21 Conn. 257. In the absence of proof, the law will presume that they contributed equally. Shoemaker v. Smith, 11 Humph. 81. A purchase of real estate completed on the credit of two, but afterwards paid for wholly by one of them, does not of itself give rise to a resulting trust. Brooks v. Fowle, 14 N. H. 248. Where A purchased B's land at an execution sale, and the purchase-money was furnished to A for the benefit of B, it was held that B had an equitable estate in the land. Pegues v. Pegues, 5 Ired. Ed. 418. But to raise a resulting trust where an estate is purchased in the name of one with money paid by another, the payment or advance of money must precede the purchase. Mahorner v. Harrison, 13 Sm. & Mar. 53; Smith v. Sackett, 5 Gilman, 534; Buck v. Swazey, 35 Maine, (5 Red.) 41. Where three persons advanced money for the purchase of land under the parol agreement that the fee thereof should be conveyed to two of them, and that the third should have wood from the same during life, and the conveyance was so made, there was no resulting trust to the third, nor did he have any legal or equitable estate in the land. Dow v. Jewell, 1 Foster, (N. H.) 470; Hunt v. Moore, 6 Cush. 1.]

Parol declarations of the nominal purchaser, made at or after the sale, are not sufficient to raise a trust in favor of another, without any allegation of payment by the *cestui que trust*, or of fraud. Sample v. Coulson, 9 Watts & Serg. 62. But if the grantee obtained the deed by means of his promise to hold it for another, this is sufficient to create a trust, on the ground of fraud, and may be proved by parol. Miller v. Pearce, 6 Watts & Serg. 97. And see Hoge v. Hoge, 1 Watts, 163; Jenkins v. Eldridge, 3 Story, R. 181.

<sup>1</sup> It is sufficient if a definite part of the consideration be paid by the *cestui que trust*, or the agreed value of a definite proportion of the whole estate, as, one moiety, or one third, to raise a resulting trust in his favor; and this, whether the party paying be one person, or many. It is only where the proportion is indefinite, that no trust arises. Sayre v. Townsend, 15 Wend. 647; White v. Carpenter, 2 Paige, 217, 241; Wray v.

eral persons agreed to purchase an estate in the name of one, and the purchase-money by the deed appeared to be paid by him only; he did not know any case where such persons should come into the Court of Chancery, and say, they paid the purchase-money; but it was expected there should be a declaration of trust. (a)

45. In all cases of this kind, the payment of the money must be *proved by clear and undoubted evidence*;<sup>1</sup> for otherwise a

(a) 9 Mod. 235.

Steele, 2 V. & B. 388; Botsford v. Burr, 2 Johns. Ch. 405; Hays v. Wood, 4 Rand. 272; [Dwinal v. Veasie, 36 Maine, (1 Heath,) 509; Purdy v. Purdy, 3 Md. Ch. Decis. 547.]

This evidence may be deduced from expressions in the purchase deed; or from a memorandum or note of the nominal purchaser; or from his answer to a bill of discovery, or from papers left by him, and discovered after his death. In England, according to some respectable authorities, parol evidence is not admissible against the answer in Chancery of the purchaser, expressly denying the fact; nor after his death, against the express declaration of the deed. See 1 Sand. on Uses, 354. But the latter position is denied, and parol evidence held admissible. See 2 Mad. Ch. 141, 3d ed.; 3 Sugd. on Vend. 256—259, 10th ed.; Lench v. Lench, 10 Ves. 517. But the grantor himself cannot set up a resulting trust in his own favor, by proving that he had an interest in the purchase-money, against the express terms of his deed. Squire v. Harder, 1 Paige, 494; [Raybold v. Raybold, 20 Penn. (8 Harris,) 308; Pratt v. Ayer, 3 Chand. (Wisc.) 265.]

In the United States, it seems now to be generally conceded that parol evidence, though received with great caution, is admissible, in all cases, to establish the collateral facts, (not contradictory to the deed, unless in case of fraud,) from which a trust may legally result; and that it makes no difference, as to its admissibility, whether the nominal purchaser be living or dead. 1 Greenl. on Evid. § 266, and cases there cited; 2 Story on Eq. Jur. § 1201, note; Boyd v. McLean, 1 Johns. Ch. 586—590; Jackman v. Ringland, 4 Watts and Serg. 149; Pritchard v. Brown, 4 N. Hamp. 397; Slaymaker v. St. John, 5 Watts, 27; Buck v. Pike, 2 Fairf. 1; Andrews v. Jones, 10 Ala. R. 401, 460. [A trust resulting by implication of law is not within the Massachusetts Statute of Frauds, (Rev. St. ch. 59, p. 30,) but may be proved by parol. Peabody v. Tarbell, 2 Cush. 226; Livermore v. Aldrich, 5 Cush. 431. See also Brown v. Lunt, 37 Maine, (2 Heath,) 423; Barron v. Barron, 24 Vt. (1 Deane,) 375; Reid v. Fitch, 11 Barb. Sup. Ct. 399; Wetherell v. Hamilton, 15 Penn. (3 Harris,) 195; Lloyd v. Carter, 17 Ibid. 216; 18 Ibid. 134, 157, 283; Hollis v. Hayes, 1 Md. Ch. Decis. 479; Williams v. Van Tuyl, 2 Ohio, N. S. 336; Coates v. Woodworth, 13 Ill. 654; Nichols v. Thornton, 16 Ibid. 113. The mere declaration of a purchaser of land that he is about to purchase it for another, there having been no previous arrangement for such purchase, will not raise a trust, for the benefit of the latter. Blyholder v. Gilson, 18 Penn. (6 Harris,) 134.]

But it is universally agreed that parol evidence is admissible to rebut a resulting equity or trust. Lamplugh v. Lamplugh, 1 P. Wms. 113; 1 Sand. on Uses, 355; 1 Greenl. on Evid. § 296; Jackson v. Feller, 2 Wend. 465; Botsford v. Burr, 2 Johns. Ch. 405, 409; Jackson v. Mills, 13 Johns. 463; Malin v. Malin, 1 Wend. 625; [Baker v. Vining, 30 Maine, (17 Shepl.) 121; Baldwin v. Campfield, 4 Halst. Ch. R. 891.]

court of equity will not interfere. But *evidence of any kind*, even parol evidence, is *admissible to rebut a resulting trust*, and to show a purchaser's *intention*, that the estate should belong to the person in whose name the conveyance was taken; upon the same principle that parol evidence is admissible to rebut a resulting use. (a)

46. Thus, in a case in 1693, the counsel contended that where there was an express trust declared, though but by parol, there could be no resulting trust; for resulting trusts were saved indeed by the Statute of Frauds, but only as they were before that act. Now a bare declaration by parol, before the act, would prevent any resulting trust. The Court seemed to be of that opinion. (b)

47. A father purchased lands in the names of his younger son and nephew; but in the conveyance the whole purchase-money was mentioned to be paid by the father; who took the profits during his life, and died, leaving the younger son an infant. The eldest son brought his bill against the younger son and the nephew; insisting that the money being mentioned in the deed to have been paid by the father, this made the defendants trustees for the father; consequently for the plaintiff. It was resolved that parol evidence should be admitted to show the intention of the father, that this conveyance was for the benefit and advancement of the younger son; because it concurred with the conveyance, and was only to rebut a pretended resulting trust. (c)

48. It was formerly doubted whether in the case of a *purchase made by a trustee, with trust money*, a resulting trust \*would arise to the person entitled to the money; because \*393 that would be to contradict the deed by parol evidence, in direct opposition to the Statute of Frauds. It has, however, been since determined, that *evidence aliunde is admissible in equity*, to show that the purchase was made with trust money. And where that circumstance has been clearly proved, a trust will result to the person entitled to the money.

49. A bill was brought by the legatees of John Ryal, against the executrix and heir at law of Jonathan Ryal, for satisfaction

(a) *Finch v. Finch*, 15 Ves. 43. Tit. 11. c. 4. (b) *Bellasis v. Compton*, 2 Vern: 294.  
(c) *Lamplugh v. Lamplugh*, 1 P. Wms. 111. *Bartlett v. Pickersgill*, 1 Eden. 515.

out of his assets, and as against the heir at law, to have satisfaction out of an estate purchased by Jonathan Ryal, as the plaintiff insisted, with the assets of John Ryal, the original testator. The defendant, the executrix, admitted, that as to one particular estate, it appeared by her testator's papers, that it was purchased with £250 of the testator's money. Proof was read that Jonathan Ryal, after the testator's death, purchased several estates, and before that time was a poor person, not able to pay for them out of his own money. The counsel for the plaintiff insisted that the heir at law was to be considered as a trustee for them, as far as the estate appeared to be purchased with the assets of John Ryal. On the other side it was contended that money could not be followed into land.

Lord Hardwicke said, the Court had been very cautious in following money into land; but had done it in some cases. No one would say but the Court would, if it was actually proved that the money was laid out in land. The doubt with the Court in these cases had been on the proof. There was difficulty in admitting proof; parol proof might let in perjury; but it had always been done, when the fact had been admitted in the answer of the person laying it out. If the executor of John Ryal had been a party, and admitted it, there would have been no doubt; but the admission was by his representative, which, though it did not bind the heir, was ground for inquiry. The way of charging the heir was by considering him as a trustee; as when lands were purchased by one, in the name of another, it was a resulting trust by law, and out of the statute; and upon inquiry a little would do to make it a charge *pro tanto*. It was referred to the Master to inquire whether the estate was purchased with £250 of the testator's money, or not. (a)

50. Although a trustee for a purchase should buy land,  
394\* yet \*it will not be liable to the trust, unless there are  
circumstances affording a strong presumption that the  
land was bought with the trust money.

51. (John Lockyer devised his estate to his brother Thomas, in trust, to preserve it till his son should arrive to twenty-one, and then to invest it, *and the accruing rents, &c.*, in lands, and settle them on the son in fee. The estate was real and personal.

(a) Ryal v. Ryal, Amb. 413.

The testator died in 1734. The *cestui que trust* came of age in 1749; devised all his estate to his wife in 1759; and died in 1765. The trustee purchased several estates in his own name, from time to time, before the death of his son and afterwards, and died in 1785. The son's widow filed a bill for execution of the trust, and for an account of rents, &c., and prayed that any deficiency in *the latter* might be made up out of the remaining *real* estates of the trustee, he having left no personalty. The heir at law resisted this, on the ground that the estates had not been purchased with the trust money; and as to so much of the rents as accrued subsequent to the making of the son's will, in 1759, it was to be taken as *real estate*, being money directed to be laid out in land, and *so did not pass by the will*, it being *subsequently* acquired.)

Lord Rosslyn declared that the plaintiffs had no lien on the estates purchased by T. Lockyer; being creditors by simple contract only. If there had been any ground to presume that the purchase had been made with the trust money, it would have been otherwise. On a bill of review, the decree was affirmed by Lord Eldon. (a)

52. Where the legal estate in lands is conveyed to a stranger, *without any consideration, (or declaration of use to the grantee,)* there arises a resulting trust to the original owner; in conformity to the old doctrine, that where a feoffment was made without consideration, the use resulted to the feoffor. (b) <sup>1</sup>

53. The Duke of Norfolk executed a grant of the next avoidance of a church to a clergyman, who was much employed by him; but the grantee knew nothing of it; and being examined in a cause, deposed that he did not purchase it of the duke. It was decreed to be a resulting trust for the grantor, there being no trust declared. (c)

54. In the case of *voluntary settlements and wills*, if there is

(a) *Perry v. Phelps*, 1 Ves. 251. 4 Ves. 108. 17 Ves. 173. (b) Tit. 11. c. 4. s. 16.

(c) *Norfolk v. Browne*, 1 Ab. Eq. 381. Prec. in Cha. 80.

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[<sup>1</sup> Mere want of consideration in a deed will not of itself alone raise a resulting trust. *Philbrook v. Delano*, 29 Maine, (16 Shep.) 410. The presumption of law, where an absolute deed purports to have been made for a good or valuable consideration paid by the grantee, is that the estate is held by him for his own use, and this presumption cannot be rebutted by parol evidence. *ib.* See *Graves v. Graves*, 9 Foster, (N. H.) 129.]

*no declaration* of the trust of a term, it *results to the settlor*; otherwise where it is a settlement for a valuable consideration, and in the nature of a contract for the benefit of a wife or children. (a) <sup>1</sup>

55. Where the legal estate in lands is conveyed to a trustee, and *a trust is declared as to part only*, nothing being said  
395 \* of \*the rest; what remains undisposed of, results to the original owner. (b)

56. Lord Foley devised his estates to trustees for a term of ninety-nine years, remainder to his eldest son for life, remainder to his first and other sons in tail, remainder to his second son in the same manner. The trust of the term for years was to pay off certain scheduled debts, and to make an annual allowance to his two sons for their support. The scheduled debts being stated to be paid, a bill was filed by other creditors of the sons of the testator, against the trustees, praying that the term might be declared to be attendant on the inheritance, and the trustees restrained from setting up the term to defeat any ejectment or other remedy which the plaintiffs might be advised to pursue for the recovery of their debts. Lord Thurlow said, the rule of law was, that where the trusts of a term were exhausted, a trust resulted, for want of a further disposition, to the legal tenants. In his judgment, these must be resulting trusts, and, therefore, must go to the tenant for life. (c)

57. In the same manner, where the whole of an estate is conveyed *for particular purposes*, or on particular trusts only, which, by accident, or otherwise, *cannot take effect*, a *trust will result to the original owner*, or his heir; as where a testator devises real estates to trustees, in trust to sell, and to apply the money in a particular manner; and where such purpose cannot be effected, the fund, though money, will be considered as land, and result to the heir. (d)

(a) 1 Atk. 191.

(b) Lloyd v. Spillet, 2 Atk. 150.

(c) Davidson v. Foley, 2 Gro. R. 203. Sidney v. Shelly, 19 Ves. 352. Habbergham v. Vincent, 2 Ves. jun. 204.

(d) Prec. in Cha. 162, 541. 3 P. Wms. 20. Gravenor v. Hallum, Amb. 643.

<sup>1</sup> Where a daughter's portion was charged on her father's land, and she, at his request, had released her interest in the land, to enable him to make a clean settlement thereof upon his son; it was held that if this were done by her without any consideration, there would be a resulting trust in the father, whereby he should be chargeable to the daughter for so much money. Lady Tyrrell's case, Freem. 304, (by Hovenden.)

58. A woman devised her real and personal estate to trustees, in trust, to sell and pay debts and legacies ; and to pay the residue to five persons, to be equally divided between them. One of the residuary legatees died in the lifetime of the testatrix, by which her legacy became lapsed. It was decreed by Lord Bathurst, that this was a resulting trust, as to the share of the person who died in the lifetime of the testatrix, for the benefit of the heir. (a)

59. The rule that where lands are devised for a particular purpose, what remains, after that purpose is satisfied, results to the heir, admits of *several exceptions*.

60. R. Smith devised an advowson to Grace Smith, willing and desiring her to sell and dispose of the same to Eton College ; and, on their refusal, to Trinity College, Oxford, &c. Soon after \* the death of the testator, Grace Smith presented a \* 396 person to the living ; upon which the heirs at law of the testator filed their bill, praying that the bishop might be enjoined from accepting the presentee of Grace Smith ; insisting that the testator did not intend the then avoidance should go to Grace Smith ; but that she ought to be considered altogether as a trustee for the heirs at law of the testator. Lord Hardwicke said, the general question was, whether there was a resulting trust or not ; on the first hearing, he inclined to think there was, but he had changed his opinion entirely. The general rule, that where lands were devised for a particular purpose, what remained resulted, admitted of several exceptions. If J. S. devised lands to A to sell them to B, for the particular advantage of B, that advantage is the only purpose to be served, according to the intent of the testator ; and to be satisfied by the mere act of selling, let the money go where it will. Yet there was no precedent of a resulting trust in such a case. Nor was there any warrant from the words or intent of the testator to say, the devise severed the beneficial interest, but was only an injunction on the devisee to enjoy the thing devised in a particular manner. If A devised lands to J. S., to sell for the best price to B, or to lease for three years at such a fine, there was no resulting trust. So that the devise here amounted to no more than this :—The testator gave the advowson to G. Smith, but if such or such a college would

(a) Digby v. Legard, 3 P. Wms. 22, n. Ackroyd v. Smithson, 1 Bro. R. 503, 2d edit.

buy it, then he laid an injunction upon her to sell; therefore, there were two objects of the testator's benevolence, namely, Grace Smith, and the colleges. (a)

61. Where a person makes a conveyance of the legal estate to trustees, *upon such trusts*, and for such intents and purposes *as he shall appoint*, and *never makes an appointment*, there will be a *resulting trust* to him and his heirs. For the trust in equity must follow the rules of law in the case of a use. (b)

62. It has been long settled, that *where a trustee takes a renewal of a lease in his own name*, the renewed lease shall, in equity, be subject to the former trust. This doctrine is founded on general policy to prevent fraud; for, as the trustee's situation, in respect to the estate, gives him access to the landlord, it would be dangerous to permit him to make use of that circumstance for his own benefit. (c)<sup>1</sup>

63. A lease of the profits of Romford market was devised to a trustee, in trust, for an infant; before the expiration of the term, the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused; in regard that it being only the profits of a market, there could be no distress; and the only security for payment of the rent would be a covenant, which the infant could not enter into. The trustee then took a lease for his own benefit. It was decreed by Lord King that the lease should be assigned to the infant; that the trustee should account for the profits, since the renewal, and be indemnified from the covenants in the lease. He said he must consider this as a trust for the infant; for if a trustee, on a

(a) Hill v. Epis. London, 1 Atk. 618. King v. Dennison, 1 Ves. & Beam. 260.

(b) Fitzg. 223. Clere's case, tit. 11. c. 4.

(c) 1 Cha. C. 191. Palmer v. Young, 1 Vern. 276.

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<sup>1</sup> It is a settled doctrine of Equity, that where a trustee, or other person, standing in a fiduciary relation, obtains possession, or otherwise makes a profit out of any transactions within the scope of his authority, that possession or profit will belong to the *cestui que trust*; and the trustee will be compelled to convey accordingly. See Story on Equity Jur. Vol. I. § 321, 322, Vol. II. § 1261, 1262, 1263, 1265; 4 Kent, Comm. 438; Arnold v. Brown, 24 Pick. 96; Morgan v. Boone, 4 Munr. 297; Holridge v. Gillespie, 2 Johns. Ch. 30. In case of the renewal of a lease, the additional term is said to come of the old root, and to be of the same nature, and subject to the same equity. Rakestraw v. Brewer, 2 P. Wms. 511. And see Manlove v. Bale, 2 Vern. 84; Pickering v. Vowles, 1 Bro. Ch. Cas. 197, and note (1,) by Perkins; Milner v. Harewood, 18 Ves. 274.



refusal to renew, might have a lease to himself, few trust estates would be renewed by the *cestui que trust*. That the trustee should rather have let it run out, than have taken a lease himself. It might seem hard that the trustee was the only person of all mankind, who could not have the lease; but it was very proper that rule should be strictly pursued, and not in the least relaxed. For it was very obvious what would be the consequence of letting trustees take leases, on a refusal to renew to the *cestui que trust*. (a)

64. This doctrine has been *extended* to the case of persons *having only a particular and limited interest* in a leasehold estate.

65. Thus, where a tenant for life of a crown lease, under a marriage settlement, got a reversionary renewal of the lease; it was decreed by Sir T. Sewell, M. R., that it should go to the uses of the settlement; and the decree was affirmed by Lord Camden. (b)

66. Where any *fraud* is committed in obtaining a conveyance of real property, the grantee in such conveyance will be considered, in equity, as a trustee for the person who has been defrauded. (c)

67. Where a father purchases lands in the name of his infant child, without any declaration of trust, and takes the profits during the minority of the child, such purchase will be considered, in equity, as an *advancement* for the child, and not as a trust for the father. Because, between a father and his child, blood is a sufficient consideration to raise a use. And herein the law of trusts does, as it ought to do, agree with the law of uses. For, if before the Statute 27 Hen. VIII., a father had made a feoffment to his son, without any consideration, no use would have \*resulted to the father, because blood was a \*399 sufficient consideration to have vested the use in the son. Besides, as a father is bound by the law of nature to provide for his child, the purchasing in his name will be construed in a court of equity to be a performance of that obligation; and the taking

(a) *Keech v. Sandford*, Sel. Ca. in Ch. 61. *Blewett v. Millet*, 7 Bro. Parl. Ca. 367. *Killick v. Flexney*, 4 Bro. C. C. 161. *James v. Dean*, 11 Ves. 363. *Fitzgibbon v. Scanlan*, 1 Dow, 261.

(b) *Taster v. Marriot*, Amb. 668. 734. *Lee v. Vernon*, 5 Bro. Parl. Ca. 10.

(c) 2 Atk. 150.

of the rents during the minority of the child, only implies that the father acted as guardian to his child. (a) <sup>1</sup>

68. J. Mumma purchased a copyhold in the name of his eldest son, an infant of about eleven years old, laid out £400 in improvements, paid the purchase money and the fines, and enjoyed it during his life. He surrendered to the use of his will, devised it to his wife for life, remainder to his younger children, and made other provisions for his eldest son. Upon the death of the father, the eldest son recovered this copyhold in ejectment. The widow brought a bill to be relieved upon the principle that the eldest son was a trustee for the father. Lord Chancellor Jefferies declared, that as the eldest son was but an infant at the time of the purchase, though the father did enjoy during his life, it must be considered as an advancement for the son, and not a trust for the father. (b)

69. In the case of *Lamplugh v. Lamplugh*, it was resolved, that if the purchase had been made in the younger son's name only, it had been plainly an advancement for him and no trust. That the case did not differ, in regard the persons named by him did disclaim; especially since prudential reasons might be given why those persons were joined,—namely, that they might help and protect the infant younger son; also to prevent the estates descending to a remote relation, in case the younger son died before his father. For in such case a court of equity would have said, if the father were to come for the estate, though this would have been an advancement, in case the younger son had lived to have enjoyed it, yet the younger son dying, the trustee should, in equity, have conveyed it back to the father. And this might be the use and intention of naming these trustees. Besides, the younger son being but eight years old, was unfit to be a trustee, therefore must be intended to have been named for his own benefit. (c)

(a) *Grey v. Grey*, 1 Cha. C. 296. Finch, R. 341.

(b) *Mumma v. Mumma*, 2 Vern. 19.

(c) (1 P. Wms. 111.)

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<sup>1</sup> Whether a purchase by a father, in the name of his infant child, is to be deemed an advancement to the child, or a resulting trust to the father, is a question of intention, susceptible of proof by parol testimony, where such testimony is not contradictory to the deed. Thus, where B executed a deed of conveyance of a farm to K, an infant daughter of A, for a valuable and full consideration, recited as paid by A, in whose

70. A father purchased copyhold lands in his son's name, who was then eighteen years of age, and continued in possession till his death. \*Lord Hardwicke,—“ I am of opinion \*400 that it should be considered as an advancement for the son, and found my opinion greatly on the case of *Mumma v. Mumma*; and though two receipts are produced under the son's hand, for the use of the father, I think that will not alter the case; for the son, being then under age, could give no other receipt in discharge of the tenants, who held by lease from the father. And in this case, I am of opinion that parol evidence may be admitted, though, indeed improper, when offered against the legal operation of a will, or an implied trust; but here it is in support of law and equity too.” (a)

71. A purchase by a father, in his own name and that of his son, has, in some cases, been deemed an advancement for the son, not a trust for the father. But this doctrine has been altered; and it has been held that in such a case a moiety of the estate will be subject to the father's debts. (b)

72. A father made a purchase of land in his own name, and that of his eldest son, and their heirs; and a similar purchase in his own name, and that of his younger son. The father paid the purchase-money, and continued in possession till the time of his death. A judgment creditor of the father's brought his bill to have satisfaction of his debt out of those estates. It was insisted that the sons took them to their own use as an advancement, and were not trustees for their father. Lord Hardwicke said,—The general rule had been admitted, and had been long the doctrine of the Court, that notwithstanding the father paid the whole

(a) *Taylor v. Taylor*, 1 Atk. 380. *Dyer v. Dyer*, 2 Cox's R. 92.

(b) *Scroop v. Scroop*, 1 Cha. Ca. 27.

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possession the deed remained; he continuing to occupy the land for more than thirty years, until his death; it appearing, by parol testimony, which was held admissible, that the deed was taken in the daughter's name for the purpose of avoiding some expected difficulties to the father, with the understanding that when he should be rid of them, he should surrender this deed and take another directly to himself; it was held not an advancement to the daughter, but a resulting trust to the father. *Jackson v. Matsdorf*, 11 Johns. 91. And see *Prankard v. Prankard*, 1 Sim. & Stu. 1. To repel the presumption of an intended advancement, the evidence of a different intention on the part of the father must be contemporaneous with the purchase. *Murless v. Franklin*, 1 Swanst. 13. [*Douglas v. Brice*, 4 Rich. Eq. 322; *Cartwright v. Wise*, 14 Ill. 417; *Shepherd v. White*, 10 Texas, 72.]

money, yet if the purchase was made in the name of a younger son, the heir of the father should not insist it was a trust for the father. But this case differed from that rule, or any other that he remembered; and if he could find any material difference, he should, in his own judgment, be inclined to relieve the creditor. For though it might be proper *stare decisis*; yet, he thought, the case had gone far enough in favor of advancements, and he ought not carry it farther. It must be admitted that in some cases which had been before the Court, the father had continued in possession, where the purchase had been made singly in the name of the son, and yet held an advancement for the son; and for this reason, because the father was the natural guardian of the sons during their minority. Here the purchase was 401\* in \*the names of the father and sons as joint-tenants; now this did not answer the purpose of an advancement, for it entitled the father to the possession of the whole till a division, and to a moiety absolutely, even after a division; besides the father's taking a chance to himself of being a survivor of the other moiety. If the son had died during his minority, the father would have been entitled to the whole by survivorship; and the son could not have prevented it by severance, he being an infant. Suppose a stronger case, that the father had taken an estate by purchase to himself for life, with remainder to his son in fee,—should this prevail against the creditors? No, certainly; for the defendant's father having the profits for life, and the son only a remainder, the estate would have been liable. A material consideration for the plaintiff was, that the father might have other reasons for purchasing in joint-tenancy,—namely, to prevent dower on the estate, and other charges. Then consider how it stood in respect to the creditor. A father here was in possession of the whole estate, and must necessarily appear to be the visible owner of it, and the creditor would have had a right, by virtue of an *elegit*, to have laid hold of a moiety; so that it differed extremely from all the other cases. Now, it was very proper that the Court of Chancery should let itself loose, as far as possible, in order to relieve a creditor, and ought to be governed by particular circumstances of cases; and what could be more favorable to the plaintiff than that every foot of the estate was covered by these purchases? and unless the Court let him

in upon these estates, the plaintiff had no possibility of being paid. Decreed, that a moiety of these purchases was liable to the debt. (a)

73. A purchase by a grandfather in the name of his grandchild, provided the father be dead, in which case the grandchildren are in the immediate care of the grandfather, will be deemed an advancement for the grandchild, not a trust for the grandfather. (b)

74. Where a person purchased a copyhold estate in the names and for the lives of his three natural children, who were admitted, and described as his daughters in the admission, Mr. Fearne inclined to the opinion that the daughters were entitled to the estate for their own use; because every man is under a natural obligation to provide for such children. (c)

\*75. It is said by Lord Nottingham, that *where a son* \*402 *is married in the life of his father, and by him fully advanced and emancipated*, there a purchase by the father, in the name of his son, may be a trust for the father as much as if it had been in the name of a stranger; because, in that case, all presumptions or obligations of advancements cease. But where the son is *not advanced*, or but *advanced or emancipated in part*, there is no room for any construction of a trust by implication; and without clear proofs to the contrary, it ought to be taken as advancement of the son. (d)

76. It is also said by Lord Chief Baron Gilbert, that if a father purchases in the *name of his son, who is of full age*, which, by the English law, is an emancipation out of the power of the father; there, *if the father takes the profits*, or lets leases, or acts, in any other manner, *as the owner of the estate*, the son will be considered as a trustee for the father; because there is the same resulting trust, as if the son were a stranger, since it was purchased with the father's money. But if the father had let the *son continue in possession* from the time of the purchase, without acting as owner, it would be an advancement. For the legal interest being in the son, and the father permitting him to act as owner of the estate, from the time of the purchase, did as

(a) *Stileman v. Ashdown*, 2 Atk. 477. (11 Johns. 96.)

(b) *Ebrand v. Dancer*, 2 Cha. Ca. 26. *Lloyd v. Read*, 1 P. Wms. 608.

(c) *Fearne's Op.* 327.

(d) *Finch, R.* 341. *Elliot v. Elliot*, 2 Cha. Ca. 231. *Pole v. Pole*, 1 Ves. 76.

much declare the trust for the advancement of the son, as if it had been declared in express words in the deed. (a)

77. A wife cannot be a trustee for her husband; therefore if *a husband purchases lands in the name of his wife*, it shall be presumed, in the first instance, to be an advancement and provision for the wife.<sup>1</sup>

78. A married man purchased a walk in a chase, and took the patent to himself and his wife, and J. S. for their lives, and the life of the longest liver of them. Lord Chancellor Jefferies held, that this should be presumed an advancement and provision for the wife; for she could not be a trustee for her husband. Decreed to the wife for life; and if J. S. should survive her, then to be a trust for the executors of the husband. (b)

79. A husband purchased a copyhold, to himself, his wife, and daughter, and their heirs. It was held to be an advancement, and not a trust; and that a mortgage by the husband should not bind the lands after his decease, in the lifetime of the wife and daughter. (c)

403 \* 80. There can be *no resulting or implied trust* between a *lessor and his lessee*; because every lessee is a purchaser by his contract and his covenants; which excludes all possibility of implying a trust for the lessor. Therefore, if in that case there be any trust at all, it must be declared in writing; but there may be a resulting or implied trust between the assignor and assignee of a leasehold estate. (d)

81. [Notwithstanding the *dictum* of Lord Hardwicke in the case of *Bagshaw v. Spencer*, that all trusts were in notion of law executory, (and which has been controverted by Fearnie with his usual ability,) the distinction is now well established between trusts executed and trusts executory, in marriage articles and wills. (e)]

(a) Gilb. *Lex Prætoria*, 271.

(b) *Kingdom v. Bridges*, 2 Vern. 67.

(c) *Back v. Andrews*, Prec. in Cha. 1. 2 Vern. 120.

(d) *Pilkington v. Bayley*, 7 Bro. Parl. Ca. 383. *Hutchins v. Lee*, 1 Atk. 447.

(e) 2 Atk. 246, 583. 1 Coll. Jurid. 413. *Fearnie*, Rem, 141, Ed. 8.

[<sup>1</sup> The law is clear that there is no resulting trust in favor of the husband, from the fact that the lands conveyed to the wife were paid for with the money of the husband. The legal estate is clearly in her, and the presumption of law is that it is for her own benefit. A trust, therefore, if there be any, for the husband, must be shown and established by other evidence than that showing merely that the purchase-money was paid by the husband. *Whitten v. Whitten*, 3 Cush. 191.]

82. Where the devise or trust is *directly and wholly declared* by the testator or settlor, *so as to attach on the lands immediately*, under the deed or will itself, *it is a trust executed* and complete; and must be construed strictly according to its legal import, and in analogy to corresponding limitations of legal estates: but where the devise, trust, or agreement is *directory or incomplete*, describing the intended limitation of some future conveyance or settlement directed to be made for effectuating it, there the *trust is executory*; and the Court of Chancery will not construe the devise or articles strictly, but will endeavor to discover the intention, and execute the trust, according to that intention.] (a)

83. When trusts were first introduced, it was held that none but those who were *capable of being seised to a use* could be trustees. This has been altered; and it is now settled, that the *king may be a trustee*; but the remedy against him is in the Court of Exchequer. (b)

84. A corporation may also be a trustee, not only for its own members, but also for third persons. And where a corporation is a trustee, the Court of Chancery has the same jurisdiction over it as over a private person. (c)

85. When once a trust is sufficiently created, it will fasten itself on the estate. Therefore if a conveyance or devise, by which a trust is created, becomes void by the incapacity or death of the grantee or devisee, still the Court of Chancery will decree the trust to be carried into execution. The relief is administered by considering the land, in whatever person \*vested, as bound by the trust; and compelling the heir, \*404 or other person having legal estate, to perform it. (d)

86. A person devised lands to his daughter, a married woman, for her separate use. It was held that the husband should be a trustee for his wife. For as the testator had a power to devise the premises to trustees for the separate use of his wife, the Court of Chancery, in compliance with his declared intention, would supply the want of them. (e)

87. An estate was devised to the Clock-makers' Company, upon certain trusts. Decreed, that though the devise was void,

(a) Tit. 32. C. 20. Tit. 38. c. 14. 1 Jac. & Walk. 570. (b) 1 Ves. 453. 3 Bl. Comm. 438.

(c) Mayor of Coventry v. Attorney General, 7 Bro. Parl. Ca. 285. 2 Ves. Jun. 46.

(d) 1 Ves. 468.

(e) Bennet v. Davis, 2 P. Wms. 316.

the Clock-makers' Company not being capable of taking, yet that the trust was sufficiently created to fasten itself upon any estate the law might raise; therefore that the heir at law was a trustee for the uses of the will. (a)

88. [The rule that the trust attaches upon the land so as to convert all persons acquiring the legal estate into trustees, has *an exception* in the case of a conveyance by the trustee, to a purchaser for a valuable consideration, without notice of the trust: the remedy of the *cestui que trust* is against the trustee.] (b)

(a) *Sonley v. Clock-makers' Company*, 1 Bro. C. C. 81. Tit. 38. c. 2.

(b) *Snag's case*, cited in *Freem. Ch. Rep.* 2d. ed. 43. c. 47. *Qu. Sherley v. Fagg*, 1 Ch. Ca. 68. And see 1 P. Wms. 278, 279.



## CHAP. II.

## RULES BY WHICH TRUST ESTATES OF FREEHOLD ARE GOVERNED.

SECT. 1. <i>A Trust is equivalent to the Legal Ownership.</i>	SECT. 27. <i>But not for Felony.</i>
6. <i>Trusts are Alienable.</i>	29. <i>Not subject to Escheat.</i>
9. <i>Devisable and Descendible.</i>	30. <i>Liable to Crown Debts.</i>
10. <i>May be Entailed.</i>	31. <i>And to all other Debts.</i>
11. <i>And also limited for Life.</i>	34. <i>Merge in the Legal Estate.</i>
12. <i>Subject to Curtesy.</i>	36. <i>Where a Legal Estate is a Bar in Ejectment.</i>
16. <i>When subject to Dower.</i>	39. <i>Where a Reconveyance will be presumed.</i>
22. <i>Not to Free Bench.</i>	
25. <i>Forfeitable for Treason.</i>	

SECTION 1. We have seen that trust estates owe their origin to the strict construction given by the courts of law to the Statute of Uses; in consequence of which, the Court of Chancery interposed its authority, and supported this kind of property. In the exercise of this jurisdiction, that court first laid it down that a trust being in fact a use not executed, should be regulated by the rules which had been established respecting uses, before they were changed into legal estates: but as this doctrine was productive of all the inconveniences which were meant to be remedied by the Statute of Uses, it has been in a great degree abandoned.

2. In the case of *Burgess v. Wheate*, (a) Lord Mansfield said,—“In my apprehension, trusts were not on a true foundation till Lord Nottingham held the great seal. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been since raised. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII. meant to avoid. The *forum* where

(a) *Infra*, tit. 30. 1 Black. R. 155, 161. 1 Eden, 223.

it is adjudged is the only difference between trusts and legal estates. \* Trusts here are considered, as between the *cestui que trust* and trustee, and all claiming by, through, or under them, or in consequence of their estates, as the ownership, and as legal estates; except when it can be pleaded in bar of the exercise of this right of jurisdiction. *Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate.*"

3. In a subsequent part of the same speech, Lord Mansfield says, the above doctrine is founded on the maxim that equity follows the law; which is a safe, as well as a fixed principle; for it makes the substantial rules of property certain and uniform, be the mode of following it what it will. And Lord Thurlow has observed that, in many acts of parliament, an equitable estate was considered the same as if it were a legal estate; that the words *seised in law or in equity*, in the qualification act, showed that the word *seised* was applicable to both; and that the word *seisin* extended to being seised in equity. (a)

4. It is of the utmost importance that trust estates of the nature of freehold should be considered in equity as perfectly analogous to legal estates of the same kind, and subject to every incident to which such legal estates are liable; consequently, that there should be a disseisin, abatement, or intrusion, allowed on a trust estate, as well as on a legal one. And this doctrine was admitted by Lord Eldon and Lord Redesdale in a late case, which will be stated hereafter. (b)

5. A trust estate still, however, retains some few qualities of a use. Thus *confidence in the person is necessary* to the existence of a *trust*; so that even at this day, if a trustee sells the land for a valuable consideration to a person who has no notice of the trust, the purchaser will not be compelled in chancery to execute it.<sup>1</sup> As for *privity of estate*, it was formerly held to be as necessary as confidence in the person. But this seems to be

(a) *Watts v. Ball*, 1 P. Wms. 108, *infra*, s. 13. 2 Bro. C. C. 271.

(b) *Cholmondeley v. Clinton*, tit. 31. c. 2.

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<sup>1</sup> But if the purchaser had notice of any paramount title, Chancery will hold him trustee for the benefit of all persons whose rights he has thus sought to defeat. As to what shall constitute notice, in cases of subsequent purchase, see *post*, tit. 32, ch. 29.

now altered; for Lord Mansfield has said, “That part of the old law which did not allow any relief to be given for or against any estates in the *post*, does not now bind by its authority in the case of trusts. (a)<sup>1</sup>

6. *Any disposition of a trust* by the *cestui que trust* was formerly binding on the trustees in a court of equity. But it was enacted by the Statute of Frauds, s. 9,—“That all grants and assignments of any trust or confidence shall be *in writing*, signed \* by the party granting or assigning the same; or \*407 else shall be utterly void and of none effect.”

7. Although by the Stat. 1 Rich. III. c. 1, the conveyance of a person, having only a use, was made good against the feoffees to use; yet, it does not appear to have been ever held, since the Statute of Uses, that a *cestui que trust* could convey any thing more than a trust estate. And in all modern cases, where there has been a conveyance from a *cestui que trust*, the legal estate has been considered as still remaining in the trustee. (b)

8. It was laid down by Lord Nottingham as a general rule,—“That any legal conveyance or assurance by a *cestui que trust* shall have the same effect and operation upon a trust, as it should have had upon the estate in law, in case the trustees had executed their trust. (c)

9. Trust estates are also *devisable*, as will be shown hereafter.<sup>2</sup>

(a) Tit. 11. c. 2. 1 Black. R. 155.

(b) Tit. 11. c. 2. 1 Sanders on Uses, 35. 8 Term R. 494.

(c) 2 Cha. Ca. 78.

<sup>1</sup> See *ante*, tit. 2, ch. 2, § 12, 13.

<sup>2</sup> As to the power of trustees to devise trust property, the decisions are not uniform. In *Cooke v. Crawford*, 13 Sim. 91, the testator devised his real estates to A, B, and C, in trust, that they, or the survivors or survivor, or the *heirs* of the survivor should, at their discretion, sell the same; and he empowered them and their *heirs* to make contracts with purchasers and to give deeds; and declared that the receipts of them or the survivors or survivor of them, or the *heirs*, executors, or administrators of such survivor, should be a good discharge to such purchaser; and directed that they, their heirs, executors, administrators, and assigns, should hold the proceeds of sale upon certain trusts. A and B renounced the trust; and C alone acted; and *devised* the estates to the plaintiffs upon the same trusts. After his death, the plaintiffs agreed to sell the estates to the defendant; and the defendant refusing to complete the purchase, on the ground that the plaintiffs, being only devisees of the trustee, could not make a good title nor give a valid discharge for the purchase-money, without the concurrence of the *cestui que trust*, a bill was filed to compel them to perform the contract. But Vice-Chancellor Shadwell said that, upon the language of the will, it was plain that C was not authorized to devise the estate. And he protested against the proposition,

And where they are not devised, they will descend to the heir of the person who was last entitled to them, in the same manner as legal estate (a)

(a) Tit. 38. c. 3. Tit. 29. c. 3.

that it was a beneficial thing for a trustee to devise the trust estate; observing that, in his opinion, it was not beneficial to the estate to allow the trustee to dispose of it to whomsoever he might think proper; nor was it lawful for him to make any disposition of it. He ought to permit it to descend; for, in so doing, he acts in accordance with the devise to himself. And he saw no substantial distinction between a conveyance, *inter vivos*, and a devise, which was a *post mortem* conveyance. He, therefore, allowed the demurrer to the bill. See also *Townsend v. Wilson*, 1 B. & Ald. 608; *Bradford v. Belfield*, 2 Sim. 264.

But in the subsequent case of *Titley v. Wolstenholme*, 7 Beav. 425, the Court seemed to view the matter differently. In that case, R. Titley devised certain estates to his wife and his son and R. Tebbutt, their heirs, executors, administrators, and assigns, upon trust, to be performed by "the said trustees and the survivors and survivor of them, his or her heirs and assigns;"—directing them to sell the residuary real estate, and give receipts for the purchase-money; directing "the said trustees and executors and the survivors and survivor of them" to get in the personal estate; and providing how "the said trustees and executors and survivors, his or her executors and administrators," should apply the proceeds of the estate directed to be sold, &c.; and "if it should appear to said trustees, or the survivors or survivor of them, his or her heirs or assigns, that it would be advantageous to sell" certain estates, it should be lawful "for said trustees or the survivors or survivor of them" to do so. He also gave to the "trustees for the time being" a power of leasing; adding an indemnity clause in favor of his "trustees and executors;" and appointing his son and R. Tebbutt and another person his executors. The will contained no power to appoint new trustees. By the deaths of all the others, R. Tebbutt became sole surviving executor and trustee; and then devised all the trust property to the defendants, their heirs and assigns, upon the trusts mentioned in the will of R. Titley. The bill, in this case, was filed by the *cestuis que trust* under the will of R. Titley, praying a declaration that this last devise to the defendants was void, and that it might be set aside, and for the appointment of new trustees, and a conveyance to them of the trust property.

It was held by Lord Langdale, Master of the Rolls, upon considering the whole will, and especially upon the word "*assigns*," that the testator meant to give to the survivor the power of devising, subject to the trusts; but that he did not intend to give the trustees the power of delegating the trust during their own lives. And he proceeded to state the general doctrine in the following terms:—"When a trust estate is limited to several trustees, and the survivors and survivor of them, and the heirs of the survivor of them, and no power of appointing new trustees is given, we observe a personal confidence given, or at least probably given, to every one of the several trustees. As any one may be the survivor, the whole power will eventually come to that one, and he is entrusted with it, and being so, he is not, without a special power, to assign it to any other; he cannot, of his own authority, during his own life, relieve himself from the duties and responsibilities which he has undertaken.

"But we cannot assume, that the author of the trust placed any personal confidence in the heir of the survivor; it cannot be known, beforehand, which one of the several trustees may be the survivor; and as to the contingent survivor, it cannot be known,

10. It was formerly held that a trust estate, being merely the creature of a court of equity, was not within the Statute *De Donis*; and, therefore, that where a trust estate was limited to a person and the heirs of his body, he might, after issue had, bar such issue by a feoffment, bargain and sale, &c. But this has been long since altered; and it was fully settled that a trust estate

beforehand, whether he may have an heir or not, or whether the heir may be one, or may consist of many persons, trustworthy or not, married women, infants, or bankrupts, within or without the jurisdiction. The reasons, therefore, which forbid the surviving trustee from making an assignment *inter vivos*, in such a case, do not seem to apply to an assignment by devise or bequest; which, being made to take effect only after the death of the last surviving trustee, and, consequently, after the expiration of all personal confidence, may, perhaps not improperly, be considered as made without any violation or breach of trust. It is to take effect, only at a time when there must be a substitution or change of trustees,—there must be a devolution or transmission of the estate, to some one or more persons not immediately or directly trusted by the author of the trust,—the estate subject to the trusts must pass either to the *heres natus*, or the *heres factus* of the surviving trustee, and if the heir or heirs at law, whatever may be their situation, condition, or number, must be the substituted trustee or trustees, the greatest inconvenience may arise, and there are no means of obviating them, other than by application to this Court. With great respect for those who think otherwise, and quite aware that some inconveniences, which can only be obviated in this Court, may arise, from devising trust estates to improper persons, for improper purposes, I cannot, at present, see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustee.

“But the case so considered is not the present case. We have, in this will, expressions which clearly show, that the testator intended the trusts to be performed by the ‘assigns’ of the surviving trustee; and in construing the will, we must, if practicable, ascribe a rational and legal effect to every word which it contains. We cannot, consistently with the rules of this Court, consider the word ‘assigns’ as meaning the persons who may be made such by the spontaneous act of the surviving trustee to take effect during his life; but there seems nothing to prevent our considering it as meaning the persons who may be made such by devise and bequest; and if we do not consider the word ‘assigns’ as meaning such persons, it would, in this will, have no meaning or effect whatever.” See 7 Beav. 434—436; *Braybroke v. Inskip*, 8 Ves. 417, Sumner’s ed., notes; *Jackson v. Delancy*, 13 Johns. 537; 4 Kent, Comm. 538, 539, and cases there cited. *Post*, tit. 38, ch. 10, § 140, 141. The case of *Cooke v. Crawford* is reviewed, and its doctrine strongly disapproved, in 2 Jarm. on Wills, 714—718.

In *New York*, it is enacted by statute, (Vol. II. p. 15, § 68, 3d ed.,) that upon the death of the surviving trustee of an *express* trust, the trust shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the Court of Chancery, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the Court. [By the Maryland Statute, (Act 1831, ch. 311, § 11,) mere naked trusts, when the trustee has no beneficial interest or estate whatsoever in the lands, descend to the heir at common law. *Duffy v. Calvert*, 6 Gill, 487.]

*might be entailed* in the same manner as a legal one ; and that, [previously to the Stat. 3 & 4 Will. IV. c. 74,] such entail could only be barred by a fine or common recovery. (a)

11. A trust estate *may also be limited to a person for life*. And in such case, no fine or other assurance, by the *cestui que trust* for life, will operate as a forfeiture of his estate ; because the forfeiture of legal estates being derived from feudal principles, and never extended to uses, the Court of Chancery has, in this instance, adhered to the ancient rules.

12. Although a man could not be tenant, by the curtesy of a use, before the Stat. 27 Hen. VIII., because the wife could have no seisin of a use ; yet it has been determined by the Court of Chancery that a husband may acquire an *estate by the curtesy* in a trust.

13. A person having two daughters, devised his lands 408 \* to trustees \* and their heirs, in trust, to pay his debts, and to convey the surplus to his daughters equally. The eldest daughter brought her bill for a partition ; and the only question was, whether the husband of the youngest daughter should have an estate for life conveyed to him as tenant by the curtesy. The husband, in his answer, had sworn that he married the younger daughter upon a presumption that she was seised in fee of a legal estate in the moiety ; that, at the time of the marriage, she was in the receipt of the profits of such moiety ; and, it was admitted, that this trust was not discovered till after the death of the younger daughter. Lord Cowper decreed that trust estates ought to be governed by the same rules, and were within the same reason, as legal estates ; that as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of a trust estate ; and if there were not the same rules of property in all courts, all things would be as it were at sea, and under the greatest uncertainty. (b)

14. [The husband will be *entitled to curtesy* out of the trust or equitable estate of inheritance of the wife, *notwithstanding the trust be declared* during the life of the wife *for her separate use*.

15. This point was for a time unsettled. In *Roberts v. Dixwell*, the trust was to convey the testator's real estate for the sole

(a) *North v. Way*, 1 Vern. 18. *Bowater v. Ellis*, 2 Vern. 844. *Kirkham v. Smith*, Amb. 518. (b) *Watts v. Ball*, 1 P. Wms. 108.

and separate use of his daughter Priscilla, and after her death upon trust for the heirs of her body forever. Lord Hardwicke held this not to be an estate tail in Priscilla, because the trust was executory; but that it would have been otherwise had the trust been executed; the trust for the separate use of Priscilla for life, not preventing the union of the life-estate with the subsequent trust to the heirs of her body. In the subsequent case of *Hearle v. Greenbank*, Lord Hardwicke made a decision in opposition to the general doctrine laid down by him in the preceding case. There Doctor Worth devised real estate to trustees, upon trust, for the separate use of Mary, the wife of William Winsmore, and upon further trust to permit her to dispose thereof by deed or will, notwithstanding coverture. Mary Winsmore was the only child and heir of the testator. Her appointment, by will, was invalid by reason of her infancy; and, at the testator's death, the equitable fee in reversion, not being disposed of by the will, descended upon her. \*The question was, \*409 whether her husband was entitled to curtesy; and Lord Hardwicke decided in the negative, observing, there was no seisin in deed of the inheritance in the wife during the coverture, and so the husband was neither at law, nor in equity, tenant by the curtesy. In the recent case of *Morgan v. Morgan*, closely resembling *Hearle v. Greenbank*, Sir John Leach, V. C., decided that the husband was entitled to the curtesy, thereby overruling the latter case. In *Morgan v. Morgan*, the trust in a marriage settlement was for the sole and separate use of the wife for life, with power to appoint by deed or will; and for want of appointment, for the wife, her heirs, and assigns. His Honor observed, in the conclusion of his judgment, that the husband was partially and not wholly excluded from the enjoyment of the wife's property; that the Court, according to the intention of the settlement, would restrain his interference with the rents during the wife's life, but as there was no further exclusion expressed in the settlement, the Court would not restrain him from the enjoyment of his general right as tenant by the curtesy.] (a) <sup>1</sup>

(a) *Roberts v. Dixwell*, 1 Atk. 606. *Fearne*, Rem. 54—5. *Hearle v. Greenbank*, 3 Atk. 698, 715. S. C. 1 Ves. sen. 698. *Morgan v. Morgan*, 5 Mad. 408. *Bennet v. Davis*, 2 P. Wms. 316.

<sup>1</sup> [1 *Norton v. Norton*, 2 Sandf. Sup. Ct. 296.]

16. It might have been expected that where the Court deviated so far from the old law of uses as to allow curtesy of an equitable estate, it would have extended the same indulgence to dower, being a right strongly favored by the common law; yet it had been long settled, [previously to the recent Statute 3 & 4 Will. IV. c. 105,] that *a widow is not dowable at law of an equitable estate*, whether the husband himself had parted with the legal estate, or a trust estate had descended upon or been limited to him.<sup>1</sup>

17. The first time this point appears to have been determined was in 12 Cha. II.; and although this doctrine has been followed by subsequent chancellors, yet they have uniformly expressed their regret at being bound by such a precedent. But many cases of this kind have arisen, and the determinations have been uniform against the claim of dower out of a trust estate. (*a*)

18. Thus, a husband, before marriage, conveyed his estate to trustees and their heirs, in such manner as to put the legal estate out of him. It was determined, that though the trust estate was limited to him and his heirs, yet his widow should not be endowed of it; that the Court had never gone so far as to allow dower in such a case. (*b*)

410 \* 19. A purchased an estate in the names of two trustees, who acknowledged the trust after his death. Upon a claim made by his widow to dower, it was decreed that she was not dowable. The decree was affirmed in the House of Lords. (*c*)

20. Sir J. Jekyll has attempted to distinguish between the case of a trust created by the husband himself, and a trust created by another person. In the first case, he admits it to be a settled point, from the authority of the preceding cases, that the wife cannot have dower; because, it must be presumed, the trust was created for the sole purpose of barring dower. Accordingly, it had been the common practice for purchasers to take a conveyance of the legal estate in a trustee's name, to prevent dower.

(*a*) *Colt v. Colt*, 1 Cha. R. 134.

(*b*) *Bottomley v. Fairfax*, Prec. in Cha. 336.

(*c*) *Ambrose v. Ambrose*, 1 P. Wms. 321. Printed cases, in Dom. Proc. 1717.

<sup>1</sup> In many of the United States, the widow is by statute made dowable of equitable estates, under various modifications. See *ante*, tit. 6, ch. 2, § 25, note. See also 4 Kent, Comm. p. 43—47.



But in the second case, where a trust estate descended, or came to the husband from another person, it was different. This distinction has, however, been exploded by Lord Hardwicke, in a case which will be stated hereafter. (a)

21. It is also laid down by Sir Joseph Jekyll, that where a particular time is appointed for conveying the legal estate to the husband, and he outlives that time, without obtaining such conveyance, his widow shall, notwithstanding, be entitled to dower in equity; for where an act is to be done by a trustee, that is looked on as done which ought to have been done. But this doctrine is not supported by the decree in the case referred to, without the additional proposition, that a widow was dowable of an equity of redemption in fee. It was a mortgage in fee, and not paid off during the coverture. If the trustee, therefore, had conveyed, he would have conveyed an equity of redemption only subject to a mortgage in fee; and the widow would not have been entitled to dower, unless she was dowable out of such equity of redemption, which she was not. This, therefore, though said, will not support the decree; and the proposition is too important, and contradicted by too many analogies, to be hazarded upon this *dictum* alone. (b)†

22. It is said by Lord Cowper, that the widow of a *cestui que trust* of a copyhold ought to have her *free bench*, as well as if the husband had the legal estate in him.<sup>1</sup> But this doctrine has been contradicted in the following case: (c)

\* 23. A bill was brought by a widow for a customary \* 411 estate. The husband's father bought the lands, which were conveyed to him and D., and the heirs of the father. The father devised the lands to the husband in tail; and D. survived the husband. The custom was laid for the wife to have the whole, as her free bench. Lord Hardwicke,—“It is an established doctrine now, that a wife is not dowable of a trust estate. Indeed, a distinction is taken by Sir J. Jekyll, in *Banks v. Sutton*,

(a) 2 P. Wms. 708. *Goodwin v. Winsmore*, 2 Atk. 525. *Post*, s. 23.

(b) *Banks v. Sutton*, 2 P. Wms. 706. *Dixon v. Saville*, tit. 15. c. 3.

(c) 2 Vern. 585.

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[† But now, by the Statute 3 & 4 Will. 4, c. 105, s. 2, women married after the 1st of January, 1834, are dowable out of equitable estates. *Sup. tit. 6, ch. 1, s. 25, note.*]

<sup>1</sup> In the United States, she is dowable in Equity. See *ante*, tit. 6, ch. 1, § 6—10; and ch. 2, § 24, note (2), and § 25, note (1).

in respect to a trust, where it descends or comes to a husband from another, and is not created by himself; but I think there is no ground for such a distinction; for it is going on suppositions which will hold on both sides; and, at the latter end of the report, Sir J. J. seems to be very diffident of it, and rested chiefly on another point in equity; so that it is no authority in this case. But there is a late authority in direct contradiction to the distinction above taken in *Banks v. Sutton*; the case of the Attorney-General *v. Scott*. The only case for the plaintiff is that of *Otway v. Hudson*, 2 Vern. 583. There it was free bench, and is so called here; but, it appears plain to be only customary dower. *Free bench* is merely a widow's estate in such lands as the husband *dies seised of*;<sup>1</sup> not that he is seised of during the coverture, as dower is. There were many circumstances in the case of *Otway v. Hudson*; it was decreed on the endeavor of the husband to get the legal estate surrendered, and the refusal of the trustees; and grounded on his will; but as to the general doctrine at the latter end, it is not warranted by the decree." The bill was dismissed. (a)

24. Where a man, *immediately* before his marriage, privately and secretly conveys his estate to a trustee for himself, *in order to defeat his wife of dower*, such conveyance will be deemed *fraudulent and void*. (b)

25. *Before the Statute of Uses*, the king was not entitled to a use upon an attainder for treason of the *cestui que use*, as is mentioned in the preamble to that statute; so that *afterwards*, trusts were by an analogy drawn from uses, also *protected from forfeiture*, upon an attainder of the *cestui que trust* for *high treason*. This produced the Statute 33 Hen. VIII. c. 20, by which it is enacted,—“That if any person shall be attainted or convicted of high treason, the king shall have as much benefit and  
412 \* advantage by \* such attainder as well of uses, rights,  
entries, and conditions, as of possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament. (c)

(a) *Goodwin v. Winsmore*, 2 Atk. 525. *Atto.-Gen. v. Scott, Forrest*, 138. Tit. 10. c. 3. *Forder v. Wade*, 4 Bro. C. C. 521.

(b) Tit. 32. c. 27.

(c) Tit. 11. c. 2. s. 24. *Vide supra*, tit. 1. s. 67—69.

<sup>1</sup> Any portion of the lands given to the widow for her dower, by special custom, other than that assigned by the common law, is termed her *free bench*. See tit. 6, ch. 1, § 8, 9, 10.

26. Lord Hale has observed that at the time when this statute was made, there could be no use but that which is now called a trust; and although it was determined in Abington's case, that a trust estate of freehold was not forfeited by attainder of treason, yet that resolution could not be reconciled with the Statute 33 Hen. VIII., as the uses there mentioned could be nothing but trusts; therefore he was of opinion, that upon an attainder for high treason of the *cestui que trust* of an inheritance, the equity or trust was forfeited; though possibly the land itself was not forfeited. (a)

27. Whatever may be the case in an attainder for high treason, it has been determined that an attainder for *felony* is *not* within the Statute 33 Hen. VIII. Therefore, in such a case, neither the trust nor the land becomes forfeited; for the king has his tenant as before, namely, the trustee. (b)

28. Freeman Sands being attainted of felony, for the murder of his brother, and having a trust estate in lands held of the king, of which Sir George Sands had the legal estate; the Attorney-General preferred an information in the Exchequer against Sir G. Sands, to have a conveyance of the legal estate to the king. The Court resolved, that although Freeman Sands had the trust of the land at the time of his attainder, yet inasmuch as Sir G. Sands continued seised of the lands, and so was tenant to the king, though subject to the trust, yet the trust was not forfeited to the crown; but that Sir G. Sands should hold the lands for his own benefit, discharged from the trust. (c)

29. It was decreed by Lord Northington in a modern case, that a *trust estate of inheritance does not escheat* to the crown by the death of *cestui que trust*, without heirs;<sup>1</sup> but that the trustee shall hold the land discharged from the trust. Lord Mansfield held, that trust estates *should escheat* in the same manner as legal ones, and Lord Thurlow appears to have been of the same opinion. (d)

(a) 1 Hal. P. C. 248.

(b) *Vid. Supra*, tit. 1. s. 69.

(c) Attorney-General v. Sands, 1 Hale, P. C. 249.

(d) Burgess v. Wheate, tit. 30. § 26. King v. Holland, Allyn, 14. Style, 41. acc. And see Weaver v. Maule, 2 Rus. & M. 97.

<sup>1</sup> See, accordingly, 2 Bl. Comm. 337; Att'y-Gen. v. Sands, Hardr. 488, 494, per Hale, Ld. Ch. B.; 1 Hal. P. C. 249, S. C. In *Maryland*, it is held otherwise, agree-

30. It appears somewhat doubtful, whether trusts were originally *liable to crown debts*. But by the Statute 13 Eliz. c. 4, it is enacted, that if any person, who is an accountant, or indebted to the crown, shall purchase any lands in the name of  
413 \* other persons, to his own use, all such lands shall be taken for the satisfaction of the debts due by such persons to the crown. (a)

31. It was formerly held by the Court of Chancery, by analogy from the old law of uses, that trust estates were not *subject to debts*, nor assets in the hands of the debtor's heirs. To remedy this, it was enacted by the Statute of Frauds, s. 10—“That it shall and may be lawful for every sheriff or other officer, to whom any writ or precept shall be directed, upon any judgment, statute, or recognizance, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, &c. as any other person or persons shall be seised or possessed in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done if the said party, against whom the execution shall be so sued, had been seised of such lands, tenements, &c. of such estate as they be seised of in trust for him at the time of the said execution sued, which lands, tenements, &c. by force and virtue of such execution, shall accordingly be held and enjoyed free and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and if any *cestui que trust* shall die leaving a trust in fee simple to descend to his heir, then and in every such case such trust shall be deemed and taken, and is hereby declared to be, assets by descent; and the heir shall be liable to and chargeable with the obligation of his ancestors, for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended.”(b) †<sup>1</sup>

(a) Tit. 1. (b) *Bennet v. Box*, 1 Cha. Ca. 12. Stat. 29 Cha. 2. c. 3. (1 and 2 Viet. c. 110.) *Harris v. Pugh*, 4 Bing. 335.

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ably to the opinion of Lord Mansfield and Lord Thurlow. *Matthews v. Ward*, 10 G. & J. 443. See *post*, ch. 4, § 4.

[† An equity of redemption is not a trust within this statute, and it has therefore been held to be equitable assets. *Plunket v. Penson*, 2 Atk. 290.]

<sup>1</sup> This statute did not extend to the Provinces, and in some of the United States

32. It has been held, that if a trustee has conveyed away the lands, by the direction of the *cestui que trust*, before execution is sued out, they cannot afterwards be taken by the creditor. (a)

33. Where a trust estate descends on the heir at law, though it may be necessary to resort to equity to reduce it into possession, yet it will be considered as legal, and not equitable assets; a trust estate being made assets by the statute. (b)

34. *Trust estates* are in all cases *subject to merge in the legal estate*, whenever both estates come to the same person, because \* a man cannot be trustee for himself. And in a \*414 modern case Lord Thurlow said it was universally true, that where the estates unite, the equitable must merge in the legal. (c)

35. In a subsequent case Lord Alvanley said,—“ Another position was maintained in a latitude that would create infinite confusion; that where there is in the same person a legal and equitable interest, the former absorbs the latter. I admit that *where he has the same interest in both*, he ceases to have the equitable estate, and has the legal estate, upon which this Court will not act, but leaves it to the rules of law. But it must be understood always with this restriction, that it holds only where the legal and equitable estates are coextensive, and commensurate; but I do not by any means admit, that where he has the

(a) Hunt v. Coles, tit. 14.

(b) 1 Atk. 298.

(c) Wade v. Paget, 1 Bro. C. C. 363. Vide Goodright v. Wells, tit. 29. See tit. 39.

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it was never adopted. Russell v. Lewis, 2 Pick. 508, 511; Merrill v. Brown, 12 Pick. 216; Walker's Introd. p. 312, 597, 598; Ashhurst v. Given, 5 Watts & Serg. 523. But the land may be reached by process in Chancery; and in many of the States it is liable to process at law against the *cestui que trust*. Hotchkiss' LL. Georgia, p. 409, § 36, reënacting Stat. 29 Car. 2, c. 3, § 10; Pritchard v. Brown, 4 N. Hamp. 397, 404. Kentucky, Rev. Stat. 1834, Vol. I. p. 443, § 13. Virginia, Stat. 1782, ch. 62; Tate's Dig. 175, (2d ed.) This statute is taken from that of 29 Car. 2, ch. 3, § 10. Clayton v. Anthony, 6 Rand. 285; Coutts v. Walker, 2 Leigh. 280. Maryland, Stat. 1795, ch. 56, and 1810, ch. 160; Hopkins v. Stump, 2 H. & J. 301; Ford v. Philpot, 5 H. & J. 316; Miller v. Allison, 8 G. & J. 35; McMechen v. Marman, Ibid. 57; Ontario v. Root, 3 Paige, 478. In Indiana, all equitable interests in lands may be taken in execution, except those of purchasers by contract, not yet performed by conveyance; which last are liable only in Equity. Indiana, Rev. St. 1843, ch. 29, art. 1, § 1, 14; Modisett v. Johnson, 2 Blackf. 431. See also Tennessee, Rev. St. 1836, p. 223, 280, 292; Stat. 1832, ch. 11, § 3; 1 Yerg. 1; 2 Yerg. 400. North Carolina, Rev. Stat. 1836, ch. 45, § 4, Vol. I. p. 266, as expounded in 3 Hawks, R. 149; Foote v. Colvin, 3 Johns. 216; Jackson v. Walker, 4 Wend. 462; 4 Kent, Comm. 308, 309, note (c) 5th ed.

whole legal estate and a partial equitable estate, the latter sinks into the former; for it would be a disadvantage to him. (a)<sup>1</sup>

36. It is a rule of law that in an *ejectment*, the plaintiff must recover upon the strength of his own title, and cannot found his claim on the weakness of that of the defendant; for possession has given the defendant a right against every man who cannot show a good title. The party who would change the possession must first establish a legal title in himself; therefore, where it can be shown by the defendant that the legal title is not in the plaintiff, he cannot recover in the action. (b)<sup>2</sup>

37. It was formerly held that an outstanding legal estate should not be set up as a bar in ejectment to the *cestui que trust*, where he was entitled to the benefit of the whole legal estate. But *Lord Mansfield* has said, the rule only was, that the *legal estate should not be set up, to defeat the cestui que trust, in a clear case*; for where the trust was perfectly manifest, the rule stood upon strong and beneficial principles; because in ejectment the question was, who was entitled to the possession. But if a trust was *doubtful, a court of law would not decide upon it* in an ejectment; it must be put into another way of inquiry. (c)

38. This doctrine has been *denied by Lord Kenyon*, who has said, that "if it appear in a special verdict, or a special case, that the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a court of law. And in this respect I cannot distinguish between the case

(a) *Brydges v. Brydges*, 3 Ves. 126, 127.

(b) *Nicholson v. Halsey*, 1 Johns. Ch. 417; *Gardner v. Astor*, 3 Johns. Ch. 53.

(c) 3 Burr. 1901; Cowp. 46; Doug. 721.

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<sup>1</sup> See, as to Merger, *post*, tit. 39.

<sup>2</sup> If the plaintiff can show a *legal* title in himself, *better* than that of the defendant, he may recover, although his title be not indefeasible. If the defendant can disprove the existence of *any* legal title at all in the plaintiff, he will prevail, on the ground of his own actual possession. But it seems that he cannot defeat the plaintiff's action by showing that a third person has a legal title paramount to that of the plaintiff, unless he can deduce that title to himself, or claims under it. But in a writ of entry, or other real action, founded on the *seisin* of the plaintiff, the tenant may disprove the allegation of the plaintiff's *seisin*, by showing that a stranger was seised, though he does not claim under him. See 2 Greenl. on Evid. § 331, and cases there cited. See also 2 Wheat. 224, note (a), where the authorities are collected and reviewed.

of an ejectment brought by a trustee against the *cestui que trust*, and an ejectment brought by any other person." (a)<sup>1</sup>

\* 39. In the case of *Lade v. Holford*, it appears to have \*415 been agreed that where the beneficial occupation of a trust estate by the person entitled to it, has given reason to suppose that there was a conveyance of the legal estate to the person who was equitably entitled to it, *a jury may be directed to presume such a conveyance*.<sup>2</sup> And this doctrine is confirmed by the following case:— (b)

40. Upon a bill in Chancery for the specific performance of an agreement to purchase a farm, the defendant objected to the title. The estate appeared to have been conveyed in 1664, by way of indemnity; and as to one moiety of the estate, there was no provision for reconveying it; as to the other moiety there was such a provision after the death of two persons then living, and eleven years after. In a family settlement, executed in 1694, the

(a) *Roe v. Reade*, 8 Term R. 118, 122. Post, c. 3. § 51—62.

(b) 3 Burr. 1901. Doug. 721.

<sup>1</sup> See acc. *Jackson v. Sisson*, 2 Johns. Cas. 321; *Jackson v. Chase*, 2 Johns. 84; *Jackson v. Pierce*, Ibid. 221; *Jackson v. Deyo*, 3 Johns. 422; *Jackson v. Van Slyck*, 8 Johns. 487; *Weakley v. Rogers*, 5 East, 138, n.; *Sinclair v. Jackson*, 8 Cowen, R. 543. In some of the United States, however, an equitable title is in some cases allowed to be set up.

<sup>2</sup> But they will not be directed to presume a conveyance, where, from the nature of the trust, and the objects of its creation, there is no inconsistency between the occupancy by the *cestui que trust*, and the existence of the legal estate in the trustee. *Doe v. Swymmer*, 1 Ld. Ken. R. by Hanmer, 385; *Doe v. Brightwen*, 10 East, 583; *Doe v. Davies*, 1 Ad. & El. 430, N. S. The general rule is, that whenever trustees ought to convey to the beneficial owner, it should be left to the jury to presume that they have so conveyed, whenever such presumption can reasonably be made. *Doe v. Sybourn*, 7 T. R. 2; *Doe v. Staples*, 2 T. R. 696. See 1 Greenl. Evid. § 46. "This rule," as Mr. Best remarks, "has been established to prevent just titles from being defeated by mere matter of form, but it is not easy to determine the practical extent of it. It may, however, be stated generally, that the presumption ought to be one in favor of the owner of the inheritance, and not one against his interest;—1 Phill. & Am. Ev. 476; *Doe d. Graham v. Scott*, 11 East, 483; *Doe d. Burdett v. Wrighte*, 2 B. & A. 720;—and the rule is subject to this further limitation, that the presumption cannot be called for where it would be a breach of trust in the trustees to make the conveyance;—1 Phill. & Am. Ev. 476; *Keene d. Byron v. Deardon*, 8 East, 267. On the same principle, reconveyances from the trustees to the *cestui que trust* will be presumed;—*Doe d. Reede v. Reede*, 8 T. R. 122; *Hillary v. Waller*, 12 Ves. 250, 251; see 2 Sudg. Vend. & Pur. 196, 10th ed.;—as also will, under proper circumstances, conveyances from old to new trustees. *Roe d. Eberall v. Lowe*, 1 H. Bl. 446." See *Best on Presumptions*, § 112.

conveyance of 1664 was excepted. From that time no notice was taken of it; but the estate was conveyed by the persons in possession, as if they were seised of the legal estate. So that the owners had acted as proprietors of the fee simple for a hundred and forty years; and no claim appeared to have ever been made on the estate, under the deed of indemnity. The objection to the title was founded on the legal estate's being outstanding. To which it was answered, that a reconveyance of it ought to be presumed. (a)

Sir W. Grant said, that length of time did not, of itself, furnish the same sort of presumption, in this case, that it did in a case of adverse possession. Long continued possession implied title; as, if there was a different right, the probability was, that it would have been asserted. But undisturbed enjoyment did not show whether the title was equitable or legal. It did not follow, however, that a conveyance of the legal estate could not be the subject of presumption; though the presumption was made upon a different ground. Lord Kenyon, though disinclined to permit ejectments to be maintained upon equitable titles, always admitted that it might be left to the jury to presume a conveyance of the legal estate. On what ground was such presumption to be made? On this, that what ought to have been done, should be presumed to have been done; when the purpose was answered for which the legal estate was conveyed, it ought to be reconveyed. Presumptions did not always proceed on  
416 \* a belief that the thing presumed had actually taken \* place.

Grants were frequently presumed, as Lord Mansfield had said, merely for the purpose, and from a principle of quieting the possession. There was as much occasion for presuming conveyances of legal estates; as otherwise titles must forever remain imperfect, and in many respects unavailable, when, from length of time, it became impossible to discover in whom the legal estate, if outstanding, was actually vested. If it could be ascertained at what period the legal estate ought to have been reconveyed, he saw no reason why the presumption of its being reconveyed at that period should not be made. The difficulty was, that by the deed of 1664 it was only as to a moiety of the estate,

(a) *Hillary v. Waller*, 12 Ves. 239. *Doe v. Lloyd*, Peake on Evid. 5th ed. App. 41. See also *Skin. 77*, *Lady Stafford v. Llewellyn*, and *Keene v. Deardon*, 8 East, 266. 1 Turn. 29, per Lord Eldon. *Cooke v. Soltan*, 2 Sim. & Stu. 154. *Tenney v. Jones*, 10 Bing. 75.



that any time was limited for the reconveyance. It could not, however, be meant that the legal estate in any part should continue outstanding forever. The conveyance of it was made for a purpose that must have some limit. It was by way of security against the eviction of another estate. At what precise moment the danger of eviction ceased, it was impossible to say; but if the time that had elapsed without claim, one hundred and forty years, did not furnish the inference that none could be made, he did not know what period would be sufficient for that purpose. Mere possibilities ought not to be regarded. The Court, as Lord Hardwicke said in the case of *Lyddal v. Weston*, "must govern itself by a moral certainty; for it is impossible, in the nature of things, there should be a mathematical certainty of a good title." The evidence of actual reconveyance was slight, and inconclusive. But on the general grounds he had before stated, he conceived there was no Court before which a question concerning this title could come, that would not, under all the circumstances of the case, presume, or direct a jury to presume, that the legal estate had been reconveyed. It was therefore such a title as a purchaser might safely take. And decreed accordingly. The decree was affirmed by Lord Erskine. (a)

[41. But where, from the nature and object of the original conveyance of the legal estate to the trustees, there is no inconsistency between the equitable ownership and the fact of the legal estate being suffered to remain outstanding, there, it seems, the presumption will not be made.] (b)

(a) Cowp. 215. 2 Atk. 19. *Doe v. Reed*, 5 Barn. & Ald. 232. S. C. Mad. & Geld, 7, and Ib. 54. *Cooke v. Soltau*, 2 Sim. & Stu. 154.

(b) *Doe v. Swymmer*, 1 Ld. Kenyon Rep. by Hanmer, 385. *Doe v. Brightwen*, 10 East, 588.

## CHAP. III.

## RULES BY WHICH TRUST TERMS ARE GOVERNED.

SECT. 1. *Terms in Gross.*6. *Terms attendant on the Inheritance.*9. *How Terms become attendant.*22. *When a Term is in Gross.*27. *A Term attendant may become a Term in Gross.*29. *Terms attendant are Part of the Inheritance.*31. *Are real Assets.*32. *Not forfeited for Felony.*33. *Trust Terms will protect Purchasers from Mesne Incumbrances.*SECT. 39. *And also from Dower.*43. *Must be assigned to a Trustee for the Purchaser.*45. *A Term will not protect the Heir from Dower.*48. *Nor the Assignees of a Bankrupt.*49. *Neither Jointure nor Curtesy barred by a Term.*51. *Where a Term is a Bar in Ejectment.*

SECTION 1. The principles upon which terms for years are held not to be affected by the Statute of Uses have been already explained; it will now, therefore, be only necessary to state the rules by which they are governed. Terms for years are either vested in trustees *for the use of particular persons not entitled to the freehold* and inheritance of the lands, *or for particular purposes*, in which cases they are called *terms in gross*; and the persons entitled to the beneficial interest have a right in equity to call on the trustees, or persons possessed of the legal estate in such terms, for the rents and profits, and also for an assignment of the terms.

2. The *cestui que trust* of a term in gross has the same power of alienating and devising it, as if he had the legal estate. It should, however, be observed, that the Stat. 1 Rich. III. does not extend to trust terms; and therefore an assignment of the trust of a term, by the *cestui que trust*, will not pass the legal estate in the term. (a)

418\* \*3. The right to a trust term in gross, vests in the

(a) *Ante*, c. 2. s. 6.

*executors or administrators* of the *cestui que trust*; and where a married woman is *cestui que trust* of a term, her husband has the same rights as if she had the legal estate. (a)

4. It is said that the trust of a term is not assets at law, within the Statute of Frauds, for that statute only extends to a trust of lands held in fee simple. But it is equitable assets, in the hands of the executor. (b)

5. Terms of this kind are in general governed by the same rules as legal ones; except that trust terms in gross are capable of being settled in a manner not allowed in the limitation of legal terms; of which an account will be given hereafter. (c)

6. When terms for years became fully established, and the interest of the termor was secured against the effect of fictitious recoveries, *long terms* were frequently created; and although *the purposes* for which such terms had been raised were *fully satisfied*, still the terms, not being surrendered, continued to exist, the legal interest remaining in the personal representatives of the persons to whom they were originally limited. But as the owners of the inheritance were entitled to the benefit of them, the *Court of Chancery deemed them to be in fact united to the inheritance*, from which they acquired the name of *terms attendant on the inheritance*; for otherwise the right to such terms would have gone to the executors or administrators of the persons entitled to the trusts of them, as part of their personal estate; and the freehold and inheritance of the lands would descend to the heir at law.<sup>1</sup>

7. Thus Lord Hardwicke has said:—"The attendancy of terms for years upon the inheritance, is the creation of a court of equity; invented partly to protect real property, and partly to keep it in the right channel. In order to it, this Court framed the distinction between such attendant terms, and terms in gross; notwithstanding that in the consideration of the common law they are

(a) Tit. 8. c. 1. Prec. in Cha. 418. 1 Inst. 351 a. n. 1.

(b) King v. Ballet, 2 Vern. 248. Creditors of Sir C. Cox, 3 P. Wms. 341. Tit. 15. c. 3. s. 18.

(c) Tit. 38. c. 19.

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<sup>1</sup> The nature of attendant terms and the doctrine of Equity respecting them, are illustrated by Mr. Butler, in his note 249, (13) to Co. Lit. 290, b. See also Sugden, Vend. & Pur. ch. 16; 4 Kent, Comm. 87—94. The subject is more fully discussed by Mr. Coventry in his learned note to 2 Pow. on Mortg. p. 477, a, to p. 491, a, Rand's ed.

both the same, and equally keep out the owner of the fee so long as they subsist. But as equity always considers who has the right in conscience to the land, and on that ground makes one man a trustee for another; and as the common law allows the possession of the tenant for years to be the possession of the owner of the freehold; this Court said, where the tenant for years is but a trustee for the owner of the inheritance, he shall  
 419\* not \*keep out his *cestui que trust*; nor, *pari ratione*, obstruct him in doing any acts of ownership, or in making any assurances of his estate. Therefore, in equity, such a term for years shall yield, ply, and be moulded, according to the uses, estates, or charges which the owner of the inheritance declares or carves out of the fee. Thus the dominion of real property was kept entire.” (a)

8. Mr. Fearne has also observed, that “without such attendancy, property in the same lands, united in the same owner, would take different channels; the dominion of real estates, instead of being entire, become split and divided between the personal and real representatives; and indeed leave the real representatives very little\* but the mere name of property. For an inheritance expectant on a term of any considerable duration is of very little value. So necessary, therefore, is the attendancy of terms, under the circumstances above mentioned, to keep real estates in a right channel; that the very existence of real property, as distinguished from the personal, seems in a great measure to depend upon it. For as there are few estates in which there are not such terms, if they are not to be considered as attendant, the whole substance and value of the estate would in them devolve to the executor, as personal property; whilst the heir or real representative would be left destitute of every thing but the shadow of the inheritance. (b)

9. A term may become attendant on the inheritance, either by an *express declaration* of trust, or by *implication of law*. Thus, where a satisfied term is assigned to a trustee, upon an express trust to attend the inheritance, the owner of such inheritance acquires a right to the term by the declaration of the parties. But there are many cases where no such declaration is made;

(a) Willoughby v. Willoughby, 1 Term R. 763.

(b) Collect. Jur. vol. 2. No. 6.

and then it becomes a question, in equity, whether it is a term in gross, or a term attendant.

10. In consequence of the maxim in equity, that "that should have the satisfaction which has sustained the loss," it has been often determined that, where a term is carved out of the inheritance for any particular purpose, when that purpose is satisfied, the term becomes attendant on the inheritance; for the inheritance sustains the loss by keeping the term on foot, and therefore should have it in satisfaction. (a)

11. A woman, before marriage, raised a term of 1000 years, upon trust, that her intended husband should receive the profits \*during their joint lives; if they should have any \*420 children, in trust for such children during the residue of the term. The husband died without children; the wife survived, married another husband, who survived, and took out administration to her. The question was, whether the term should go to the husband, or attend the inheritance. Lord Cowper said, this was only an unskilful declaration, not the intent of the party; the particular purpose being served, it must attend the inheritance. If the term and inheritance had been in the same hands, it would have merged; so here it should be attendant in equity. (b)

12. [The cases have established the following distinctions with respect to attendant terms created for the purpose of securing charges upon the inheritance.

When a tenant for life, or a tenant in tail, after possibility of issue extinct, who, for the purposes of alienation, is but a tenant for life, pays off the charge secured by the term, there *primâ facie* he will be considered a creditor on the estate, and in the absence of evidence of a contrary intention, the term will not be deemed attendant but in gross for his benefit to the extent of the incumbrance, and will accordingly devolve upon his personal representatives; he may, however, by express declaration, or other evidence of intention to exonerate the inheritance, render the term attendant thereon.

But the presumption is otherwise with respect to a tenant in tail, for as he represents the inheritance, *primâ facie*, it will be

(a) Francis Max. in Eq. 21, 22. Treat. of Eq. B. 2. c. 4. s. 5.

(b) Best v. Stampford, 1 P. Wms. 374.

presumed that he meant to discharge the estate, and unless there be evidence of a contrary intention, the term will attend.

But where a tenant in tail in remainder, expectant upon a previous life-estate and failure of issue, pays off an old mortgage, and takes an assignment of the term; the rule is otherwise, since the principle applicable to a tenant in possession paying off a charge does not apply to one whose estate might be defeated by the birth of issue of another person. Where the owner of the whole inheritance becomes entitled to such a charge, there the charge will merge, and of course the term will become attendant if kept outstanding. (a)

13. The case of *Huntingdon v. Huntingdon*, may be here distinguished as not, in any degree, militating against the preceding distinction, as regards a tenant for life.] There Lord and  
421 \* Lady Huntingdon settled lands which were \* the estate of Lady H., to the use of Lady H. for life, remainder to their eldest son in tail; with a power to Lord and Lady H. to revoke and limit new uses. Lord H. prevailed on Lady H. to exercise this power so far as to demise the premises for 1000 years by way of mortgage, for raising £4500 for Lord H., who *covenanted to pay off the money*. Lord H. paid off the mortgage, took an assignment of the term to a trustee for himself, and devised it for the benefit of his younger children. Upon the death of Lord H., his eldest son, who took the inheritance, filed his bill against the personal representatives of his father and the trustees of the term, praying that it might be assigned to attend the inheritance, free from incumbrances. Lord K. Wright decreed that the plaintiff must redeem the mortgage. But on an appeal to the House of Lords, the decree was reversed, and the term directed to be assigned to the appellant; because, when Lord H. paid off the mortgage, the purpose for which the term was created being satisfied, it became attendant on the inheritance. (b)

[In the preceding case, Lord H. was not tenant for life, but at most seised *jure uxoris*; the mortgage was made for his exclusive accommodation; and Lady H. was no party to the assignment of the term to the trustee; and, as urged in the argument for the

(a) *Jones v. Morgan*, 1 Bro. C. C. 218. *Wyndham v. Earl Egremont*, Amb. 753. *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. J. 233. *St. Paul v. Ld. Dudley & Ward*, 15 Ves. 173. *Wigsell v. Wigsell*, 2 Sim. & Stu. 364.

(b) *Huntingdon v. Huntingdon*, 2 Bro. P. C. 1. *Davidson v. Foley*, 2 Bro. R. 203. *Ante*, c. 1. s. 56.

appellant, it was against equity that Lord H. should be considered a mortgagee or incumbrancer on the estate for having discharged his own debt.]

14. Where a person purchases the freehold and inheritance of lands in his own name, and obtains *an assignment of an outstanding term to a trustee for himself*; such term will be considered as attendant on the inheritance.

15. R. Tiffin purchased a freehold estate, took the conveyance in his own name, and an assignment of a mortgage term for years in the names of two trustees. Lord Nottingham held that this term was attendant on the inheritance. (a)

16. J. Hoole took an assignment of a term for years, which was in mortgage to one Shepherd, who was a trustee for him; and afterwards purchased the inheritance of the same premises in his own name. Lord C. J. Wilmot said, when Hoole purchased the fee, he became both the hand to receive, and the hand to pay off the mortgage money. It wrought an extinguishment of the debt due on the mortgage, and the term was gone; though not extinguished in point of law, because it was in Shepherd. Yet it became *\*attendant on the inheritance*; and must *\*422* follow it in point of law, as much as if it had been made to do so by the act of the party. (b)

17. Where a person takes a conveyance of the freehold in the name of a trustee, and *an assignment of the term in his own name*, the consequence is the same.

18. A woman took a mortgage for 1000 years in the name of her brother, afterwards purchased the inheritance in the name of another, and the term of years was assigned to her. The question was, whether this term belonged to the heir, or the personal representative. A difference was taken at the bar, namely, that if she had first purchased the fee, and afterwards the lease, it should wait on the inheritance; but here the lease was first in her. Lord Keeper North said, there was no difference in reason; and decreed that the heir should have the lease, to attend the inheritance. (c)

19. A citizen and freeman of London, possessed of a lease of lands, bought the reversion and inheritance, and died. The question was, whether, as there was no declaration that this

(a) Tiffin v. Tiffin, 1 Vern. 1. Whitechurch v. Whitechurch, 2 P. Wms. 236. 9 Mod. 124.

(b) Goodright v. Shales, 2 Wils. R. 329.

(c) — v. Langton, 2 Cha. Ca. 156.

lease should attend the inheritance, it was part of the personal estate of the purchaser. Decreed that it was attendant upon the inheritance; and, upon a rehearing, the decree was affirmed by Lord Keeper North. (a)

20. It may be collected from the preceding cases, that whenever a term would merge in the inheritance, if both were in the same person, it shall be considered as attendant on the inheritance. And in the following modern case, it was resolved that where a person, having a term for years, contracted for the purchase of the inheritance, and died without having a conveyance of it, the term was attendant.

21. A bill was filed by residuary devisees and legatees, praying that the will might be established, &c.; that the plaintiffs might be declared entitled to the benefit of a contract by the testator, to purchase an estate, and the contract completed. The testator had entered into the contract, after the execution of his will, for the purchase of the inheritance of the estate, being at that time lessee of the premises for a term of years; and died before any conveyance was made. The plaintiffs, therefore, if the Court should be of opinion that they were not entitled to the  
423\* benefit of \*the contract, claimed the residue of the term, as residuary legatees. The defendant, the heir at law, claimed the inheritance of the estate contracted for, praying that the purchase might be completed out of the personal estate; insisting that the testator became seised of the inheritance from the date of the contract, and that the term was attendant upon the inheritance.

Sir W. Grant, M. R.,—"I take the case to be this:—The testator had a lease in his own name, had contracted for the purchase of the inheritance, and died before the conveyance to him was completed. Having contracted for the purchase of the inheritance, he became complete owner of the whole estate. For it is clear in this court, a party, who has contracted for the purchase of an estate, is equitable owner; the vendor is a trustee for him. If he had, by his will, afterwards disposed of all his lands, this estate would have passed by that will. I thought it had been long established, that where the same person has the inheritance and the term in himself, though he has in one the equitable in-



terest, and the legal estate in the other, the inheritance draws to itself the term, and makes it attendant. That appears from *Whitchurch v. Whitchurch*, *Goodright*, and *Shales*, and many other cases. Declare the heir at law entitled to the premises described in the term." (a)

22. The trust of a term for years may, however, belong to the person seised of, or entitled to the inheritance; and yet the term may not be attendant. For where a person indicates, in any manner, *an intention of separating a term from the inheritance*, it will be considered as a *term in gross*.

23. A being seised in fee, demised his estate to a trustee for ninety-nine years, in trust for himself and his wife for their lives, and the life of the survivor, and afterwards, in trust for the heirs of their bodies; in default of such issue, to the heirs of the body of the husband; remainder to the heirs of the survivor. They had issue a son; the husband died; after which the son died in the lifetime of his mother, who took out administration to her husband and son, and assigned the term. After the death of the wife, it was contended, by the heir of A, that all the trusts of this term either became void by accident, or were so in their creation; so that the term had no subsistence for the benefit of the personal representatives of any of the parties; but should be considered as attendant on the inheritance. \*It , \*424 was however, decreed by Sir J. Jekyll, that this term should not be attendant on the inheritance; for that the party who raised it, and had power to sever it from the inheritance, showed his intention to do so, by limiting the trust to the survivor of him and his wife, and the heirs of the survivor; which, though it was a void limitation, yet sufficed to show his intent to sever such term from the reversion. (b)

24. Where there is an *intervening legal estate*, and beneficial interest *between the term and the inheritance*, the term will be considered to be *in gross*; because, in that case, it would not merge in the inheritance.

25. Sir A. Chadwick purchased an estate, in fee simple, from Mrs. Rudger. There being an outstanding term in a trustee, a derivative lease of it was granted to a trustee for Sir A. C., with

(a) *Capel v. Girdler*, 9 Ves. 509.

(b) *Hayter v. Rodd*, 1 P. Wms. 362.

nominal reversion of eleven days to the trustee of Mrs. R. The question was, whether this term was in gross, or attendant.

Lord Thurlow said, every term standing out, was, at law, a term in gross. If it was different in equity, it must be by affecting the person holding the term, with a trust, to attend the inheritance. This might be by two ways; by express declaration; and then, whether the term would, or would not merge, and whether the reversion were real, or only nominal, it must be attendant on the inheritance. Here it was not upon express declaration; then it must arise from implication of law, founded on the Statute of Frauds, which forbids any trust, except by writing or implication of law. It was said to be extremely plain that Sir A. C. meant to consolidate the interests; this was begging the question. It was true he meant to take the largest interest he could; but it was by no means apparent that he meant to consolidate the interests. *He laid no stress on the days of reversion, for it was meant only as a nominal reversion; during that time the rent would be to the original lessor; but they did not mean to reserve a substantial interest.*

It would be necessary there should be an express trust to make this attendant on the inheritance. The transaction did not supply a necessary construction of law. It was a very nice and new point, whether the intent to purchase the whole interest was sufficient to make the term attendant upon the inheritance. *The impossibility he was under of purchasing the whole, rendered an express declaration necessary to make it attend the inheritance. (a)*

425 \* \* 26. Sir Edward Sugden has observed on this case, that at first sight it seemed impossible to reconcile those parts of the judgment which are printed in italics. But that it appeared from an opinion of Mr. Fearne's, in consequence of which the cause was reheard, that rents were reserved upon the leases granted by the trustees to Sir A. C., and the usual covenants were entered into by him; the trustees being restrained to that mode of making a title by their trust, which required a reservation of rent, and the usual covenants; this fact, at once, reconciled every part of the judgment. Lord Thurlow was of opinion, that the reversion itself was immaterial; but that the rents

(a) Scott v. Fenhouillet, 1 Bro. C. C. 69.

reserved by the leases rendered an express declaration necessary, to make the terms attend the inheritance. Mr. Fearne was also of opinion, that the terms would not be attendant, if there was any intervening estate, and beneficial interest, in any third person, to divide the ownership of the term from the inheritance. But as he was told that the rents reserved to the trustees upon the terms were afterwards purchased by Sir A. C., he thought the terms did attend the inheritance, although there was not an express declaration for that purpose; and he expressly delivered his opinion, subject to this fact, which he had learned from verbal information only. By Lord Thurlow's decree on the rehearing, it appears clearly that the rents were not purchased; and consequently, that Mr. Fearne was misinformed. (*a*)

27. In the case of *Willoughby v. Willoughby*, Lord Hardwicke says,—“*A term attendant on the inheritance may be disannexed, and turned into a term in gross*, by the absolute owner of the inheritance; and so it is admitted by Serjeant Maynard in the Duke of Norfolk's case; or it may be made to become a term in gross, upon a contingency, according to the resolution in that case.” (*b*)

28. So it was said by Lord Commissioner Raymond, that where a man has a term for years, which, by intendment of law only, attends the inheritance, certainly he has a power to sever such a term from the inheritance, if he should assign it to one man, and mortgage the inheritance to another; in such case, the term would not attend the inheritance, but become a term in gross. (*c*)

29. *Terms attendant on the inheritance are considered as absolutely annexed to the inheritance*, and are, therefore, not subject to those rules by which terms in gross are governed.

\* They follow all alienations made of the inheritance, and \* 426 also the descent to the heir; are capable of being entailed, and limited over after a general failure of issue; provided the inheritance is limited in the same manner. And where a common recovery was suffered of the inheritance, it would bar the entail and remainders over of the term, as well as those of the freehold; for the term can no longer attend an estate tail which is destroyed; nor can the trustee, who is but an instrument to

(*a*) Sugd. Law of Vend. 6th ed. 442. 9 Ves. 510. Collect. Jur. vol. 2. 297.

(*b*) 3 Cha. Ca. 46. Tit. 38, c. 19.

(*c*) 9 Mod. 127.

protect others, have the term to his own use; so that it must thenceforth attend on the inheritance in fee. (a)

30. A term which is attendant on the inheritance is so fully considered as part of it, and conjoined to it, and not as a chattel real, that it *does not pass by a will of chattels*; but only by a will executed in such a manner as is required to pass freehold estates. (b)

31. Terms attendant on the inheritance *are real assets in the hands of the heir*, for the payment of all such debts as are chargeable on the inheritance; because such terms are annexed to the inheritance, which is real assets. And where the inheritance is in trustees, and a person has a term in his own right which is attendant on the inheritance, and dies indebted, the term will be liable to his debts; for it is assets at law, and equity follows the law. (c)

32. It was determined in the case of the Attorney-General v. Sir G. Sands, that the *trust of a term attendant on the inheritance was not forfeited by the attainder for felony of the cestui que trust*; because it was no more than an accessory to the inheritance, which was not forfeited. (d)

33. One of the great objects of the common law is to protect and secure honest purchasers from all prior claims and incumbrances. It is to this principle that fines and non-claim, descents which take away entries, and collateral warranties, owe their origin and effect. The courts of equity, whose duty it is to follow the common law, soon adopted the same doctrine; and laid it down as a rule, that an *honest purchaser, without notice of any defect in the title to the lands purchased, or of any incumbrance on them*, at the time of his purchase, shall not have his title impeached in equity. Neither shall he be compelled to discover any writings or other things which may weaken it; nor will the Court of Chancery take from him any advantage by which he may defend himself at law. (e)

427 \* 34. In consequence of these principles, it has been long settled by the Court of Chancery, that where a per-

(a) Collect. Jur. vol. 1. 297. 1 Term R. 766.

(b) 1 Vent. 194. Tit. 38. c. 5.

(c) Tit. 1. Thrupton v. Attorney-General, 1 Vern. 340. Dowse v. Percival, 1 Vern. 104.

(d) Ante, c. 2.

(e) 1 Ab. Eq. 333. 2 P. Wms. 491. Shirley v. Fagg, 1 Cha. Ca. 68. See 1 Vern. 52. Jerrard v. Saunders, 2 Ves. jun. 454.

son purchases an estate, without having notice, at the time of his purchase, of any incumbrance affecting it; if he afterwards finds out that there are incumbrances, and upon such discovery obtains an assignment of a prior outstanding term for years, whether in gross or attendant, to a trustee for himself; the Court of Chancery will not interfere to set aside such a term, though it be a satisfied one; so that the purchaser, having a good title at law, by means of the term, will be thereby secured from such mesne incumbrance. The reason is, that the circumstance of his purchasing without notice, gives him equal equity with the mesne incumbrancer; and by obtaining an assignment of a prior term, he acquires the legal estate; so that he comes within the maxim; that where equity is equal, the law must prevail. Besides, the mesne incumbrancer, having only a title in equity, cannot prevail against one who has an equal title in equity, and also the legal estate; it being a maxim in chancery, that *in æquali jure melior est conditio possidentis*. Lord Nottingham has said, that precedents of this kind are very ancient and numerous, where the Court has refused to give assistance against a purchaser, either in favor of the heir or the widow, the fatherless or creditors, or to one purchaser against another. (a)†

35. In the case of *Willoughby v. Willoughby*, Lord Hard-

(a) Treat. of Eq. B. 3. c. 3. s. 1, 2, 3. Vide *Wortley v. Birkhead*, tit. 15, c. 5. Francis, 61. Finch's R. 103.

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[† Lord Hardwicke has thus explained this doctrine:—"As to the equity of this Court, that a third incumbrancer, having taken his security or mortgage without notice of the second incumbrance, and then, being *puisne* taking in the first incumbrance, shall squeeze out, and have satisfaction before the second. That equity is certainly established in general, and was so in *Marsh v. Lee*, (tit. 15, c. 5,) by a very solemn determination, by Lord Hale, who gave it the term of the creditor's *tabula in naufragio*; that is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since; and I believe was rightly settled, only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights and estates. As courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; therefore, when there is a legal title, and equity of one side, this Court never thought fit that by reason of a prior equity against a man who had a legal title, that man should be hurt; and this by reason of that force this Court necessarily and rightly allows to the common law, and to legal titles. But if this had happened in any other country, it could never have been made a question. For if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore potior est in jure*, must hold." 2 Vesey, 573.]

428\* wicke, \*after stating the origin and nature of trust terms for years, proceeds in these words:—"What kind of grantee or owner of the inheritance is entitled in this court to the protection of such a term? or, in other words, in whose hands such a term shall be allowed to protect the inheritance? In the first place, he must be a purchaser for a price paid, or for a valuable consideration; he must be a purchaser *bonæ fidei*, not affected with any fraud or collusion; he must be a purchaser without notice of the prior conveyance, or of the prior charge or incumbrance; for notice makes him come in fraudulently. If he has no notice, and happens to take a defective conveyance of the inheritance; defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also take an assignment of the term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee; in both these cases, he shall have the benefit of the term to protect him. That is, he may make use of the legal estate of the term to defend his possession; or if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance. This made me say, that in those cases the Court often disannexes the trust of the term from the legal fee; but still in support of right. For if a man come in fairly and *bonâ fide*, and has paid a price for the land, and acquired an estate in it, which the law will support, (a plank by which at law he may save himself from sinking,) there can be no ground in equity or conscience to take it from him. This is the meaning of what is generally expressed by saying, that where a man has both law and equity on his side, he shall not be hurt in a court of equity. It was once doubted whether, if the term were vested in a third person, a trustee, generally, and not in the party himself, he should be allowed the benefit of it in equity; because the Court ought to determine for whom the stranger was a trustee; and then the rule is, *qui prior est tempore potior est jure*. But this was settled by Lord Cowper, in the case of *Wilkes v. Boddington*. He lays it down to be a rule in equity, that where a man is a purchaser for a valuable consideration, without notice, he shall not be annoyed in equity; not only where he has a prior legal estate, but where he has a better right to call for the legal estate than his adversary." (a)

(a) *Willoughby v. Willoughby*, 1 Term R. 763. *Ante*, s. 7. *Wilkes v. Boddington*, 3 Vern. 599.

36. Where a term for years is vested in a trustee, upon an express \*trust, a purchaser shall not protect himself by \* 429 taking an assignment of such term, after notice of the trust.

37. Ann Bayley, being possessed of a term for years, made a voluntary settlement thereof, in trust for herself for life, remainder to her daughter Isabella for life, remainder to her children. Isabella mortgaged the lands in question for £200 to the plaintiff, who pretended he had no notice of the settlement; but hearing of it after, he got an assignment of the term from the trustees. (a)

*Per Cur.*—Though a purchaser may buy in an incumbrance, or lay hold of any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust. For, by taking a conveyance with notice of the trust, he himself becomes the trustee; and must not, to get a plank to save himself, be guilty of a breach of trust. (b)

38. An assignment of a term for years will not protect a purchaser from a crown debt; of which an account will be given hereafter. (c)

39. A term for years will protect a purchaser for a valuable consideration from the claim of dower, though such purchaser had notice of the marriage at the time of his purchase.

40. Lady Radnor's husband was seised in tail of the lands in question. But there was a term of ninety-nine years prior to his estate, which was created for the performance of several trusts in the Earl of Warwick's will, all which were performed, and after, in trust to attend the inheritance. Lord Radnor, having barred the entail, sold the estate to Vandebendy; and assigned the term to a trustee for him. After the death of Lord Radnor, his widow recovered dower, with a *cessat executio* during the term; and brought her bill in the Court of Chancery, to have the term removed, that she might have the benefit of her judgment at law. Lord C. Jeffries inclined to give relief; but Lord Somers held, that this being against a purchaser, equity ought not to give any relief; and dismissed the bill.

On an appeal to the House of Lords, it was argued for Lady Radnor, that equity did entitle her to the third of this term; that a tenant by the curtesy would be entitled to it, and by the same

(a) *Saunders v. Dehew*, 2 Vern. 271.

(b) *Vide tit.* 15. c. 5.

(c) *Tit.* 32. c. 27.

reason a tenant in dower; that the term was to attend all the estates created by Lord Warwick's will, and in trust for  
 430 \* such \* persons as should claim under it, which the appellant did, as well as the respondent; that the purchaser had notice of the incumbrance of dower, the vendor being married when he sold the estate; and that Lady Radnor claimed under her husband, who had the benefit of the whole trust.

On the other side it was said, that dower was an interest or right at the common law only; that no title could be maintained to dower, but where the common law gave it; and if a term were in being, no woman was ever let in, until after the determination of that term; that this was the first pretence set up for dower in equity; that the right was only to the thirds of the rent reserved on any term; that it had always been the opinion of conveyancers, that a term or statute prevented dower; and that the consequence of an alteration would be much more dangerous than the continuance of the old rules. The decree was affirmed. (a)

41. The doctrine established in this case is contrary to the general principles of equity, which has never extended its protection, in any other instance, to purchasers with notice of incumbrances, at the time of their purchase. The true and only reason on which it was founded was the silent uniform course of practice, uninterrupted, but, at the same time, unsupported, by legal decisions; an opinion having been generally adopted by the conveyancers, that a satisfied term would protect a purchaser from the claim of dower; and many estates having been purchased under this opinion. It is now, however, fully recognized and confirmed by a decree of Lord Hardwicke, of whose judgment on the case, a report is given by Mr. Butler, in his Notes on the First Institute. (b)

42. This doctrine has been fully recognized, in a modern case, by Sir R. P. Arden, M. R., who is reported to have said:—"It is perfectly established, that a purchaser for a valuable consideration from the owner of the equitable interest, may protect himself, though the owner could not, by the assignment of any outstanding terms. He might, therefore, protect himself against any demand she (the widow) might have of dower at law. The

(a) *Radnor v. Vandebendy*, Show. Parl. Ca. 69.

(b) *Swannock v. Lifford*, 1 Inst. 208. n. u. 1. *Hill v. Adams*, 2 Atk. 208, S. C.



decision is a very ancient one, and was affirmed by the House of Lords. Therefore, however questionable it might have been, it is now clear that a purchaser, or a mortgagee, who is a purchaser *pro tanto*, though he knows of the right of dower, may advance his money; and, taking in a term, may avail himself against any demand she might have of dower at law." (a)

43. A term standing out in a trustee to attend the inheritance *will not, however, protect* a purchaser from the claim of dower, *unless* it is actually assigned to a trustee for him. (b)

44. R. M. being seised in fee of certain lands, with an outstanding term vested in a trustee, upon an express trust to attend the inheritance, conveyed the estate to a purchaser for a valuable consideration; but no assignment of the term was made. Upon the death of R. M., his widow claimed dower in Chancery; the purchaser contended that she was barred by the term. Sir Wm. Grant, sitting for the Lord Chancellor, declared his opinion to be, that without an assignment to a trustee for the purchaser, the term did not exclude the claim to dower. And upon a rehearing before Lord Eldon, he concurred in this opinion. (c)

[In the case of *Mole v. Smith*, stated in a former page, the Court of Chancery decreed the vendor's widow, who claimed to be entitled to dower, and who happened to be the administratrix of the trustee of the term, to assign the term to a trustee for the purchaser to the exclusion of her dower.] (d)

45. The doctrine that an outstanding term of years will protect a purchaser from the claim of dower was carried still farther; for it was determined that a satisfied term should protect an heir at law from dower. But this was soon after overruled; and it was resolved that an outstanding term should *not protect an heir from dower*. (e) <sup>1</sup>

46. A term was raised in Black Acre, in trust to indemnify a person against incumbrances that might affect White Acre, which he had purchased. The defendant, Lady Williams, brought a writ of dower of Black Acre against the plaintiff, who was an

(a) *Wynn v. Williams*, 5 Ves. jun. 124.

(b) Tit. 6. ch. 4. s. 17. (c) *Maundrell v. Maundrell*, 7 Ves. 567. 10 Ves. 246, S. C.

(d) 1 Jac. & Wal. 665. Tit. 6. ch. 4. s. 18. (e) *Brown v. Gibbs*, 2 P. Wms. 707.

<sup>1</sup> The reason is, that the heir takes only the seisin of the ancestor, which was already subject to dower; of which the heir had notice, and so comes in on the footing of a volunteer.

infant. His guardian had let her take judgment at law, without setting up the term, or taking any notice of it. So the bill was brought by the infant heir, to be relieved against the judgment. It was said, by Lord Keeper Wright, that this case was the same with Lady Radnor's; and if she could not be relieved as plaintiff, it must be for want of equity; therefore, the plaintiff must be relieved against her, when she was defendant. And Lady Radnor's case having been affirmed in the House of Lords, the authority was so great that it could not be got over. At a rehearing of this cause before Lord Harcourt, Lady Williams' counsel insisted that the heir, who was but a volunteer, should not, in equity, be relieved against the dowress; and that this case was different from that of Lady Radnor, in regard Vandebendy was a purchaser. To which it was answered, that if Lady Williams had been plaintiff in the original bill in equity, she could not have been relieved, as the term must have subsisted for the benefit of the heir at law; that this was the same in reason with Lady Radnor's case; that the term was prior to the marriage, and so the husband only seised of the reversion in fee during the coverture; that as to Vandebendy's being a purchaser, he was so 442\* with full notice of dower, and got in the term \*to protect himself against the dowress; and, therefore, having notice, was to be considered as a volunteer. The decree was reversed; and it was ordered that the plaintiff, Lady Williams, having recovered dower at law, the trust term should not stand in her way in equity. (a)

47. Lord Harcourt's doctrine has been fully assented to by Lord Hardwicke, who, in the case of *Swannock v. Lifford*, said: "If the husband dies, and there is a satisfied term continuing, the wife would be entitled to come into this court, against the heir, to set that term out of the way, in order to have the benefit of her dower." (b)

48. In a case in Chancery, 10 Geo. I., stated by Mr. Viner, the question was, whether the *assignees of a bankrupt*, by taking an assignment of a mortgage term, prior to the title of dower, should protect their estate from dower. It was insisted that the creditors and assignees stood only in the place of the bankrupt; and since such an assignment to the bankrupt himself, or his

(a) *Wray v. Williams*, Prec. in Cha. 151. 1 P. Wms. 137, S. C.

(b) *Ante*, s. 41.

heir, would not protect the estate from dower, in the hands of the heir, neither should it protect the estate in the hands of the creditors of the bankrupt, or the assignees; that this differed the case from that of *Radnor v. Vandebendy*, where it was held that such a prior term should protect the estate from dower, in the hands of a purchaser. It was decreed that the widow should be let into her dower. (a)

49. It has been stated, that the Court of Chancery will *set aside* a term for years *in favor of a jointress*. A *tenant by the curtesy* is also entitled to the aid of equity against a trust term, assigned to attend the inheritance, and set up against him by the heir.

50. The plaintiff, as tenant by the curtesy, brought his bill to be relieved against a term for years, that was assigned in trust to attend the inheritance, and had been set up by the heir at law in bar to his title. Decreed that the term should not be made use of against him by the heir at law. (b)

51. In consequence of the doctrine stated in chap. 2, s. 36, if a *defendant in ejectment* can show that there is an outstanding term for years, vested in a third person, to the possession of which the plaintiff is not entitled, he cannot recover. So where a defendant can show that there is an outstanding term, of which the \*trusts are not completely satisfied; this will \*443 also operate as a bar to the plaintiff's recovery.

52. Lord Mansfield held, that though there was an unsatisfied outstanding term, yet if the plaintiff admitted the charge for which the term was created, and only claimed subject to such charge, the trustees of the term not asserting their right, he should recover. This doctrine was, however, rejected by Lord Kenyon, who held that *a satisfied term might be presumed to have been surrendered*; but that an unsatisfied term, raised for the purpose of securing an annuity, might be set up, during the life of the annuitant, as a bar to a plaintiff in ejectment, even though he claim subject to the charge. (c)

53. In another case, Lord Kenyon directed a jury to presume, that an old satisfied term was surrendered; saying, that he grounded himself upon the doctrine laid down by Lord Mansfield in the case of *Lade v. Holford*; which was not, as had been

(a) *Squire v. Compton*, 9 Vin. Ab. 227.

(b) *Snell v. Clay*, 2 Vern. 324.

(c) *Doe v. Pegge*, 1 Term R. 758. n. *Doe v. Staple*, 2 Term R. 684.

supposed, that an ejectment might be maintained upon a mere equitable title, for that would remove ancient landmarks in the law, and create great confusion; but that, in all cases, *where trustees ought to convey* to the beneficial owner, he would *leave it to the jury to presume*, where such presumption might be reasonably made, *that they had conveyed* accordingly; in order to prevent a just title from being defeated by a matter of form. (a)

54. In a subsequent case, he said, that though, under certain circumstances, a jury might presume a satisfied term to have been surrendered; yet if no such presumption was made, and it appeared in a special verdict in ejectment that such a term was still outstanding in a trustee, who was not joined in bringing the ejectment, the *cestui que trust* could not recover. (b)

55. Where an old mortgage term of 1000 years, created in 1727, was recognized in a marriage settlement of the owner of the inheritance in 1751, by which a sum of money was appropriated to its discharge; and no further notice of it was had till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others, to secure a mortgage; Mr. Baron Thompson, at the trial, and the Court of

K. B., upon a motion to set aside the verdict, held that it  
444 \* could \* not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. (c)

56. A term was created in 1711 for raising portions. There was no evidence of the payment of the portions; but a settlement of the estate took place in 1744; and it contained a covenant that the estate was free from incumbrances. It did not appear that an assignment of the term had ever been made. On an objection to the title by a purchaser, Sir John Leach, Vice-Chancellor, held, that a surrender of the term must be presumed; and that, in matters of presumption, the Court will bind a purchaser, where it would give a clear direction to a jury in favor of the fact. (d)

57. Terms for years, though assigned to a trustee for the ex-

(a) *Doe v. Sybourn*, 7 Term R. 2. Bull. N. P. 110. *Ante*, c. 2. s. 38—40.

(b) *Goodtitle v. Jones*, 7 Term R. 47.

(c) *Doe v. Scott*, 11 East, 478.

(d) *Emery v. Grocock*, 6 Madd. 54. *Ex parte Holman*, 24th July, 1821, MS. Sugd. Tend. 428. Ed. VI.

press purpose of attending the inheritance, have, in two modern cases, been presumed to be surrendered. And in the last of these cases, Lord C. J. Abbott said:—"Where a term for years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term; and, therefore, in general such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases the things done or omitted may most reasonably be accounted for, by supposing a surrender of the term; and, therefore, a surrender may be presumed." (a) †

\*58. [In *Bartlett v. Downes*, a lord of a manor, by deed, \*445 granted the stewardship of the manor for the life of the grantee. Upon the death of the grantor, it was attempted to set up a satisfied term to avoid the grant; and in order to support this grant, the Court of K. B. decided that it was properly left to the jury to presume the surrender. The term was created in 1712, assigned to attend in 1786, and in 1793 there was a general declaration as to all outstanding terms. (b)

(a) *Doe v. Wrighte*, 2 Barn. & Ald. 710. *Doe v. Hilder*, Id. 782.

(b) 3 Bar. & Cres. 616.

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[† The doctrine of the Court of King's Bench has since been very much the subject of consideration; and has been questioned by Lord Eldon, and Richards, L. C. B. See Sugd. on Vend. 6th ed. p. 420, *et seq.*—The Lord Chancellor observed: "It is not necessary to consider much the doctrine of presumption with reference to the present case; but the case of *Doe v. Hilder*, having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and, for the safety of the titles to the landed estates in this country, I think it right to declare, that I do not concur in the doctrine laid down in that case." *Aspinall v. Kempson*, Sugd. 427. Also see *Doe v. Plowman*, *infra*.

59. But in *Doe v. Cook*, the Court of C. B. refused to presume the surrender of a term in favor of a defendant who showed no title to the premises sought to be recovered. The term was created in 1793, and in 1794 was assigned to secure the sum of £6000; under decrees in Chancery in 1801 and 1802, sales had taken place in other parts of the property for the purpose of paying off the mortgage debt; but the defendant (who, it happened, had a mere naked possession,) did not produce any evidence of further proceedings in Chancery, nor of his own title to the premises. (a)

60. In the preceding cases, the presumption was made in favor of the party who had proved a right to the beneficial ownership, made to prevent justice being defeated by a mere formal objection; and the Court observed in *Doe v. Cook*, (b) that no case could be put in which any presumption had been made, except where a title had been shown by the party who called for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession was shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, had it ever been allowed.

61. The subsequent case of *Townsend v. Champernown* (c) goes a step further; there the question arose upon an exception to the Master's report in favor of a title. A term of 1000 years was recited in a deed dated 1758, to have been created several years preceding, and to have been *assigned to attend*, but neither the deed creating nor that assigning the term were produced; it was urged for the report that the term should be presumed to be surrendered, on the authority of *Doe v. Hilder*; on the other

446\* hand, the propriety of the decision in that case was questioned. \* Alexander, L. C. B., in overruling the objection, observed:—"Until a different decision be pronounced, I shall, on the authority of *Doe v. Hilder*, after the expiration of seventy years, *without payment of interest*, presume the term to be surrendered." One of the reasons of this judgment is unintelligible, and even admitting the propriety of the decision in *Doe v. Hilder*, it is not an authority for the introduction of the doctrine of presumption under the circumstances of the case of *Townsend v. Champernown*. In the former case, the presump-

(a) 6 Bing. 174.

(b) 6 Bing. 179.

(c) 1 Yo. &amp; Jerv. 538.

tion was made in favor of a creditor, who had seised the land under an *elegit*, taken out upon a judgment obtained against the owner of the inheritance; while, in the latter case, the presumption was called for by the vendor, merely to save himself the expense of getting in an outstanding estate, in compliance with the usual requisition of the purchaser.

62. In the later case of *Doe v. Plowman*, an unsuccessful attempt was made to carry the doctrine of presuming surrenders of terms still farther; a period of forty-two years only having elapsed since the term was assigned to attend. In that case, a term of 1000 years was created in 1772, for securing a sum of £5000; the mortgage debt was paid off in 1787, and in 1789, the residue of the term was assigned to a trustee for a purchaser *to attend*. The purchaser continued in possession of the estate until her death. On her marriage the estate was settled, and by virtue of a power in the settlement, she devised the estate; but neither the settlement nor the will noticed the term. One of the questions reserved was, whether a surrender of the term was to be presumed. The cases of *Doe v. Wrighte*, and *Doe v. Hilder*, being cited as in point, Lord Tenterden, C. J., observed that the doctrine, laid down in those cases, had been much questioned; and upon inquiring whether it was usual to notice in marriage settlements such a term as the one in question, and being answered in the negative, his lordship observed, that there was no ground for the presumption, and the Court so decided. (a) <sup>1</sup>

(a) 2 Bar. & Adol. 573.

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<sup>1</sup> The doctrine of the presumed surrender of a trust term is so clearly expounded in the following extracts, that the student will require no apology for their insertion.

"Few subjects," says Mr. Best, "have given rise to greater difference of opinion than that of the presumption of the surrender of their terms by trustees for terms of years. In Lord Mansfield's time, the Courts seem to have entertained notions on this subject, which, if carried out in practice, would have gone far to subvert the trial by jury on the one hand, and confound all distinction between legal and equitable jurisdiction on the other. See 3 Sugd. Vend. & Pur. 39, 40, 42, 10th ed.; *Evans v. Bicknell*, 6 Ves. 184; *Lessee L. Massey v. Touchstone*, 1 Sch. & L. 67, n. (c); *Wallwyn v. Lee*, 9 Ves. 31; *Doe d. Hodsdon v. Staple*, 2 T. R. 696; *Doe d. Bristow v. Pegge*, 1 T. R. 758, n. In the case of *Lade v. Holford*, Bull. N. P. 110, Lord Mansfield said that 'he and many of the other Judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term, standing out in his own trustees, or a satisfied term to be set up by a mortgagor against a mortgagee, but that they would direct the jury to presume it surrendered.' There is no objection to the latter branch of this proposition, which seems generally recognized in practice; for, by not assigning the term for the benefit of the mortgagee,

and afterwards setting it up against him, the mortgagor would be guilty of a gross fraud, so that the presumption of the surrender of the term is really an application of the legal maxim which presumes against fraud and covin;—3 Sugd. Vend. & Pur. 42, 10th ed. See per Lord Tenterden, C. J., in *Doe d. Putland v. Hilder*, 2 B. & A. 790;—and it has accordingly been held that such a presumption will not be made in favor of a prior mortgagee against a subsequent mortgagee in possession of the title deeds, without notice of the prior incumbrance. *Goodtitle d. Norris v. Morgan*, 1 T. R. 755; *Evans v. Bicknell*, 6 Ves. jun. 184. But the general proposition, *never to suffer* a plaintiff to be nonsuited by a term outstanding in his trustees, is, at least, if taken in its literal sense, inconsistent with principle, and at variance with subsequent authority. The surrender of a term is a question of *fact*, and the Court has not only no right, but it would be most dangerous, to advise a jury to presume such a surrender, when all the evidence clearly indicated the reverse. In *Doe d. Reede v. Reede*, 8 T. R. 122, Lord Kenyon said: ‘I agree with what was said in *Lade v. Holford*, that, where the beneficial occupation of an estate by the possessor has given reason to suppose, that, possibly, there may have been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate; but if it appear in a special verdict, or a special case, that the legal estate is outstanding in another person, the party not clothed with the legal estate, cannot recover in a court of law; and, in this respect, I cannot distinguish between the case of an ejectment brought by a trustee against his *cestui que trust*, and an ejectment brought by any other person.’ And the same learned Judge, in *Doe d. Bowerman v. Sybourn*, 7 T. R. 3, (see to the same effect, *Goodtitle d. Jones v. Jones*, 7 T. R. 43; *Doe d. Hodsdon v. Staple*, 2 T. R. 684; and *Doe d. Shewen v. Wroot*, 5 East, 132,) said, that ‘the doctrine laid down by Lord Mansfield in *Lade v. Holford*, was not, as had been supposed, that an ejectment might be maintained upon a mere equitable title, which would remove ancient landmarks in the law, and create great confusion; but that, in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, when such presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form.’

“The surrender of a term, like any other fact, may be inferred from circumstances. 3 Stark. Ev. 926, n. (m), 3d ed.; *White v. Foljambe*, 11 Ves. 351; *Doe d. Brune v. Martyn*, 8 B. & C. 513. Thus, in the case of *Bartlett v. Downes*, 3 B. & C. 616, which was an action for fees, brought by a party claiming to be steward of a manor, under an appointment made to him by the owner of the inheritance, against the defendant, who claimed under a devisee of that party, it was held that it was properly left to the jury to say whether they thought an old term outstanding or not; it appearing by the evidence, that the party under whom the defendant claimed, had admitted by letter, the right of the testatrix to appoint to the office, the grant of which also would have been void, supposing the term outstanding. It is, however, said by Lord Eldon, in the case of *Evans v. Bicknell*, 6 Ves. jun. 185, that the fact of a term having been *satisfied*, is not, when standing alone, sufficient to raise the presumption of a surrender, but that there must be some dealing with the term. And in *Williams v. Day*, 2 C. & J. 460, (see also *Doe d. Hodsdon v. Staple*, 2 T. R. 684,) which was an action by a reversioner for undermining a dwelling-house, where the defendant, in order to disprove the plaintiff’s title, proved a lease for lives to the plaintiff, and the creation of a term by will eighteen years previous, by which the premises were devised to trustees in trust to pay annuities, and for other purposes, with remainder to the lessor, it was held by the Court of Exchequer that the Judge at Nisi Prius had rightly told the jury that they could not presume a surrender of the term



“Where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made, a surrender of the term may be presumed. 1 Phill. & Am. Ev. 477; Doe d. Putland v. Hilder, 2 B. & A. 791, 792. Applications were, however, made of this principle, in the cases of Doe d. Burdett v. Wrighte, 2 B. & A. 710; and Doe d. Putland v. Hilder, Id. 782, which have occasioned as much discussion as almost any question to be found in the reports; namely, whether the surrender of a term of years assigned to attend the inheritance is, *as among purchasers or incumbrancers*, to be presumed to have been surrendered, on the ground of its having remained for a series of years unnoticed in marriage settlements, and other family documents. The negative of this proposition has been so ably advocated by Sir E. Sugden, in his work on Vendors and Purchasers, 3 Sugd. Vend. & Pur. ch. 15, s. 3, 10th ed., as to leave us little else to do than lay before our readers a summary of his arguments, after which we will state the cases the other way, together with those which have been subsequently decided. ‘It is,’ he observes, the settled law of Courts of Equity, that, if a man buys an estate fairly, he may get in a term of years or other incumbrance, although it be satisfied, and thereby defend his title *at law* against any mesne incumbrance of which he had no notice.’—The protection afforded against mesne incumbrances, by the assignment of attendant terms of years, rests on the maxim of equity, that, where there is equal equity, the law shall prevail. ‘Suppose,’ says Mr. Butler, in his note to Co. Litt. 290, b. ii. (1), p. 15, ‘A purchases an estate which, previous to his purchase, has been sold, mortgaged, leased, and charged with every kind of incumbrance to which real property is subject; in this case, A and the other purchasers, and all the incumbrancers, have equal claims upon the estate. This is the meaning of the expression, that their equity is equal. But if there is a term of years subsisting in the estate, which was created prior to the purchases, mortgages, or other incumbrances, and A, (without fraud or notice of the purchases, &c.,) procures an assignment of it in trust for himself, this gives him the legal estate in the lands *during the continuance of the term*, absolutely discharged from, and unaffected by, any of the purchases, mortgages, and other incumbrances subsequent to the creation of the term, but prior to his purchase. This is the meaning of the expression in assignments of terms, that they are to protect the purchaser from all mesne incumbrances.’ It may be made a question, whether, and to what extent, the *legal* rights of trustees are barred or affected by the new Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 2 and 6. The author is not aware of any judicial decision on this point, which is one of great importance, affecting most materially the advantages resulting from terms assigned to attend the inheritance. *At law*, every term is a term in *gross*. The owner of the fee is tenant at will to his own trustee. Freeman v. Barnes, 1 Ventr. 80; Dighton v. Greenvil, 2 Ventr. 329. The term is anxiously assigned to attend the inheritance; it does accordingly attend the inheritance, and the performance of the very service for which it was created never can be a ground for defeating its legal operation. Upon principle, therefore, a term of years assigned to attend the inheritance ought not to be presumed to be surrendered, unless there has been an enjoyment *inconsistent with the existence of the term, or some other act done in order to disavow the tenure under the termor, and to bar it as a continuing interest*. The universal practice, not to require the assignment of attending terms on descents or settlements, proves unequivocally the opinion of the profession, that the possession of the heir, and of the person claiming under the settlement, is in law the possession of the trustees of the term. Does then a subsequent purchase, without the purchaser’s taking an assignment of the term, let in the presumption of the surrender of the term? The term was assigned to attend the inheritance, and in trust for the party, his heirs and

*assigns.* If the possession of the heir and his family under the settlement was not adverse to the title of the termor, how can the title of the purchaser be so? The event—if the event is to be looked at on which this question hinges—shows that he required the protection of the term more than any of the former owners; and if *his* acts are to be adverted to, we shall find him anxiously obtaining a further assignment of the term. *There is a continued enjoyment under the original trusts, which embraces all the persons who have successively enjoyed the estate.* Does, then, the appearance of the adverse claimant weaken the [purchaser's case? So far from it, that, in the great majority of the cases in the books, the protection was not sought for until the necessity for it appeared. These cases show the rules of *equity* which flow from the anxiety of the Courts to strengthen the title, and protect the possession of purchasers; but if *at law* the outstanding term is to be presumed to be surrendered, they will no longer afford any protection to purchasers. The doctrine, that the mortgagor shall not set up an attendant term against the mortgagee, does not warrant the presumption of a surrender in this case. In the former case, there are only the rights of the mortgagor and mortgagee still in question, and the presumption is made in favor of the mortgagee; the claim of a third party does not intervene. But does it follow that a surrender should be presumed, not as between mortgagor and mortgagee, but as between two innocent mortgagees, both claiming under the same mortgagor, where one, after the execution of both mortgages, has obtained an assignment of the term? The objection is, not that a surrender cannot be presumed against an owner of the inheritance, but that the presumption ought not to be made against a *purchaser* of the inheritance, where the contest is between him and incumbrancers claiming under the seller, but of whose claims he had no notice. The rule, that, where trustees ought to convey to the beneficial owner, a jury may presume such a conveyance, in order to prevent a just title from being defeated by mere matter of form, is not denied to be a wise one, but it does not apply to the case under discussion; for, in this case, the trustees ought *not* to surrender the term. To do so, would be to commit a breach of trust; and the presumption, if it is made, has not the merit of preventing a just title from being defeated by a mere matter of form, but lets in one title to the destruction of another, *where the equities are at least equal.* The author then cites the following cases in confirmation of the position for which he is contending:—*Willoughby v. Willoughby*, 1 T. R. 772; *Goodtitle d. Norris v. Morgan*, 1 T. R. 755; *Doe d. Hodsdon v. Staple*, 2 T. R. 684; *Keene d. Byron v. Deardon*, 8 East, 248; *Doe d. Graham v. Scott*, 11 East, 478; *Evans v. Bicknell*, 6 Ves. jun. 184, 185; and *Maundrell v. Maundrell*, 10 Ves. jun. 246. See Best on Presumptions, § 113, 114, 115.

The learned author then cites and reviews the opposing cases of *Doe v. Wrighte*, 2 B. & A. 710, and *Doe v. Hilder*, Id. 782, and proceeds to observe that—"The principle laid down in these cases has not only not been followed in practice, but been condemned by high authority; by Lord Eldon, in the *Marquis of Townsend v. The Bishop of Norwich*, 3 Sugd. V. & P. 61; *Hayes v. Bailey*, Id. 62, 10th ed.; *Cholmondeley v. Clinton*, Id. 63; and *Aspinall v. Kempson*, Id. 65. It was doubted by Richards, C. B., and Graham, B., in *Doe d. Newman v. Putland*, Id. 59, 60, 61; and it should seem, also, by Sir T. Plumer, in *Cholmondeley v. Clinton*, 2 Jac. & W. 158. In *Aspinall v. Kempson*, in particular, Lord Eldon, in speaking of the case of *Doe d. Putland v. Hilder*, said, 'I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and, for the safety of the titles to the landed estates in this country, I think it right to declare, that I do not concur in the doctrine laid down in that case.' Subsequent to all these occurred the case of *Doe d. Blacknell v. Plowman*, 2 B.

& Ad. 573, which was an ejectment tried before Bayley, J., in which a verdict was returned for the plaintiff, subject to a special case, which stated the following circumstances:—In January, 1787, the residue of a satisfied term, created in 1772, was assigned to trustees to attend the inheritance. The inheritance was purchased in 1789 by Susannah Blacknell, and the term assigned to trustees in trust for her, her heirs and assigns, and in the mean time to attend the inheritance. Susannah Blacknell entered into possession, and continued so until her decease, in 1816. The present ejectment having been brought by the lessor of the plaintiff as heir at law to Susannah Blacknell, the defendant set up the term, and the question was, ought a surrender of it to be presumed from the circumstance that it was unnoticed both in a marriage settlement entered into by Susannah Blacknell, in 1808, in which the property in question was settled to various uses, and in her will, dated in December, 1813? This case having come on to be argued before the Court in banc, it was contended, on the part of the lessor of the plaintiff, that, the term being so old, and the purposes for which it was created having been answered, and it not having been mentioned either in the marriage settlement or will of Susannah Blacknell, a surrender ought to be presumed. On *Doe v. Wright* and *Doe v. Hilder* being cited as authorities in point, Lord Tenterden, (who, it will be remembered, delivered the judgment in *Doe v. Hilder*,) observed,—‘The doctrine laid down in those cases, I believe, has been much questioned. Is such a term as this usually noticed in a marriage settlement?’ And on receiving an answer in the negative, his lordship said,—‘If that be so, there is no ground for presuming that this term, which was assigned to attend the inheritance, was ever surrendered.’ Parke, Littledale, and Taunton, JJ., concurring, judgment was given accordingly for the defendant.

“It is to be observed, that, in the case of *Doe v. Plowman*, the term was allowed to defeat, not a purchaser, but the heir at law, for whose benefit it was vested in the trustees. ‘Since the decision in *Doe v. Hilder*,’ continues Sir Edward Sugden, ‘the point has been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure representations to terms of years which, they insisted, ought to have been surrendered; but the general and prevailing opinion has been, that the doctrine cannot be maintained, and the Masters have acted on that principle. We may, therefore, be justified in considering the law to stand as it did before the decision in *Doe v. Hilder*; and conveyancers of course will follow the advice of Lord Eldon, in the case of the Marquis of Townsend *v.* Bishop of Norwich, already cited, and not depart from the practice which they have hitherto followed.’ Sugd. V. & P. 64, 65, 10th ed.

“It seems, however, that in equity a term which has *not* been assigned to attend the inheritance, and which has not been disturbed for a long time, will be presumed to be surrendered, on a question of specific performance between seller and purchaser. *Id.* 66, citing *Emery v. Grocock*, Madd. & G. 54, and *Ex parte Holman*, MS. 24, July, 1821.

“Whether, in cases of this nature, the jury are bound to *believe* in the fact which they profess to find, has been made a question; and there certainly are authorities both ways. Mr. Starkie thus expresses himself on the point:—‘These presumptions are the mere artificial creatures of law, depending *entirely* on considerations of legal policy and convenience; they are *pure legal rules*; the jury being, for this purpose, mere passive instruments in the hands of the Court.’ 3 Stark. Ev. 918, 3d ed. It is hardly correct to say that these presumptions are ‘pure legal rules;’ they are of a mixed nature, resting partly on their intrinsic probability, and partly on legal expediency; and, indeed, the same author, in another place, says,—‘The

very mention of the proposition is absurd, that a jury, who are bound by their oath to pronounce according to the evidence, should decide contrary to their solemn conviction, on any collateral suggestion of convenience; as, for instance, because a purchaser is a *favorite*, either in a court of law or equity.' Id. 926, n. (m). It is beyond all question that the practice of advising juries to make artificial presumptions has been carried too far. See *supra*, part 1, chap. 3, art. 39; Doe d. Fenwick v. Read, 5 B. & A. 232; and Day v. Williams, 2 C. & J. 460. Indeed, Richards, C. B., is reported to have said, that he never desired a jury to presume when he did not believe himself;—Doe d. Newman v. Putland, 3 Sugd. V. & P. 61;—and a similar opinion has been expressed in another case, by Bayley, B., Day v. Williams, 2 C. & J. 461. This is going a great way; the learned Judges might fairly be asked, whether they would think it necessary to believe in the surrender of a satisfied term, set up by a mortgagor against his mortgagee, before they would advise a jury to presume it surrendered. Upon the whole, it may, perhaps, be safely laid down, that as in all presumptions of this nature, legal considerations more or less predominate, the jury ought to find as advised by the Judge, unless the fact appear absurd or grossly improbable, in which case, as he ought not to advise them to find, so neither ought they to find it." Best on Presumptions, § 119—122.

The subject is copiously treated by Mr. Coventry, in his note to 2 Powell on Mortg. p. 491, a, to p. 510, Rand's ed. See also Dutch, &c. v. Mott, 7 Paige, 77; Matthews v. Ward, 10 G. & J. 443.

## CHAP. IV.

## ESTATE AND DUTY OF TRUSTEES.

SECT 1. <i>Estate of Trustees.</i>	SECT. 40. <i>Bound to reimburse the Cestui que trust.</i>
5. <i>Duty of Trustees.</i>	43. <i>Have no Allowance for Trouble.</i>
9. <i>Their Acts not prejudicial to Trust.</i>	46. <i>But allowed all Costs and Expenses.</i>
10. <i>Exception—Conveyance without Notice.</i>	50. <i>Trustees seldom permitted to purchase the Trust Estate.</i>
15. <i>Where Purchasers are bound to see Trusts performed.</i>	61. <i>Refusing to act, must release or disclaim.</i>
22. <i>Where they are not bound.</i>	62. <i>Discharged, and others appointed.</i>
30. <i>Where the Receipts of the Trustees are sufficient.</i>	
37. <i>Trustees have equal Power.</i>	
39. <i>Can derive no Benefit from the Trust.</i>	

SECTION 1. Trust estates having been at first considered as similar to uses before the Stat. 27 Hen. VIII., trustees were consequently held to be in the same situation as the ancient feoffees to uses. But this was soon altered; and the Court of Chancery, in the exercise of their jurisdiction over trusts, has avoided the inconveniences that arose from leaving the legal estate in the feoffees to uses.

2. One of the principal of these was, that the estates of the feoffees to uses became subject to all their legal incumbrances. But upon the establishment of trusts it became settled, that trustees only held the legal estate for the benefit of the *cestui que trust*; and that the *legal estate was not subject to any of the incumbrances of the trustees*; to their specialty or judgment debts; to the dower of their widows, or the curtesy of their husbands. (a)

3. Where a *trustee is attainted of felony*, the *legal estate is forfeited*: but the *cestui que trust* is *entitled to relief in equity*. \* In the case of attainder for high treason, it does \* 448

(a) 1 P. Wms. 278. 2 P. Wms. 318. Noel v. Jevon, 2 Freem. 43.

not appear to have been settled whether the *cestui que trust* has any remedy against the crown. [But the better opinion seems to be that he has: the *cestui que trust* forfeits the estate for treason, and it would not be consonant with justice that the trustee should forfeit it for the same offence; and as Baron Atkyns argued in *Pawlet v. Attorney-General*, it would derogate from the king's honor, that what is equity against a common person, should not be equity against him.] (a)

4. Where a *trustee dies without heirs*, by which the lands *escheat*, either to the crown or to a subject, it seems to be doubtful whether the lord by escheat holds the lands discharged of the trust or not; the authorities, however, appear to preponderate in support of the proposition that the lord holds the lands discharged. (b) <sup>1</sup>

5. With respect to the *duty of trustees*, it is still held, in conformity to the old law of uses, that pernaney of the profits, execution of estates, and defence of the land, are the three great properties of trust.<sup>2</sup> So that the Court of Chancery will com-

(a) Carter's R. 67. *Pawlet v. Att'y-Gen.*, Hard. 465. See also the arguments in *Burgess v. Wheate*, 1 W. Bl. 160. Tit. 30.

(b) Hard. 461. Lane, 39, 54. Tit. 30.

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<sup>1</sup> In *Maryland*, it has been held that equitable as well as legal estates are liable to escheat; and that upon the escheat of the trustee's estate, the State or its assignee bears the same relation to the *cestui que trust* that the trustee did. *Matthews v. Ward*, 10 G. & J. 443. In some of the United States, it is provided by statute that all escheated lands, when held by the State, shall be subject to the original trusts, as before the escheat. *New York*, Rev. Stat. Vol. I. p. 718, § 2, 2d ed. In others, the same liability would seem to result by fair implication, from their statutes respecting escheats. See *Massachusetts*, Rev. Stat. ch. 108, § 8, 9; *Arkansas*, Rev. St. 1837, ch. 57, § 10—13, 23, p. 363, 364; *Connecticut*, Rev. St. 1838, tit. 30; *Mississippi*, How. and Hutch. Dig. ch. 34, § 79—84; *Missouri*, Rev. St. 1845, ch. 58, § 12, 13, 23—26, p. 463, 465; *Illinois*, Rev. St. 1839, p. 280, 281, § 2, 6; *Delaware*, Rev. St. 1829, tit. Escheats, p. 200, § 5; *Kentucky*, Rev. St. 1834, tit. 73, § 5, Vol. I. p. 621. In most of the statutes of Escheats, there is an express saving of the claims of aliens; and it is hardly to be supposed that the legislature intended to place these claims on a better foundation than the title of a native *cestui que trust*. And on the whole, it is conceived that no State in the Union would now hold escheated lands discharged of the trust. See 4 Kent, 425, 426; 1 Lomax, Dig. 611.

In England, by the Statute of 4 and 5 Will. 4, ch. 23, whenever the estate of the trustee escheats, the property is now made subject to the control of Chancery, for the benefit of the *cestui que trust*. And see *Lowe's estate (In re)* 36 Leg. Obs. 389.

<sup>2</sup> The words in a will, "in trust in the first place," are merely words of order and method, and do not necessarily import priority of duty or obligation. *Nash v. Dillon*, 1 Moll. 236.

pel trustees, 1. To permit the *cestui que trust* to receive the rents and profits of the land. 2. To execute such conveyances as the *cestui que trust* shall direct. 3. To defend the title of the land in any court of law or equity.

6. The necessity that the trustee should execute conveyances of the land arises from this circumstance; that as the legal estate is vested in him, and he is considered in the courts of law as the real owner, it \* follows, that although the \* 449 *cestui que trust* can alone dispose of his equitable interest, yet he cannot convey the legal estate without the concurrence of the trustee. But where the *cestui que trust* has the absolute interest in the trust, he can compel the trustee to convey the legal estate either to himself, or to any other person in fee simple. (a)<sup>1</sup>

7. The *cestui que trust* is only entitled to a conveyance where the whole subject of the trust belongs to him. For if lands are devised to trustees, in trust to pay annuities; and subject thereto, in trust for A B; the legal estate cannot be taken from the trustees while the annuities are subsisting. (b)<sup>2</sup>

8. Where there is a *cestui que trust* in tail, he may call on the trustee to convey the legal estate to him. And no one can afterwards prevent him from barring the entail; or the trustee may join with the *cestui que trust* in barring the entail. But where the *cestui que trust* is only entitled to an estate tail, the trustee ought not to convey to him in fee simple. (c)<sup>†</sup>

9. It is a rule in equity, that *no act of a trustee shall preju-*

(a) *Ante*, c. 2.

(b) 2 P. Wms. 134.

(c) 1 Ab. Eq. 384. 2 P. Wms. 131. *Boteler v. Allington*, 1 Bro. C. C. 72.

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[<sup>1</sup> Where a trustee had a discretion reposed in him by the will, as to the conveyance of the estate absolutely to the *cestui que trust*, and the jurisdiction of the Court is made "subject to any provisions contained in the will," and the Court are forbidden to "restrain the exercise of any powers given by the terms of the will" it was doubted whether the Court could overrule the discretion of the trustee and order him to transfer the property to the *cestui que trust*; and if it had the power, it would be exercised only on the clearest proofs. *Morton v. Southgate*, 28 Maine, (15 Shep.) 41. A decree cannot require a trustee in conveying property to the *cestui que trust*, to execute a general warranty deed; only a special warranty against his own acts should be required. *Hoare v. Harris*, 11 Ill. 24. See also *Dwinel v. Veasie*, 36 Maine, (1 Heath,) 509.]

<sup>2</sup> An administrator of a trustee cannot sell the trust lands for payment of the debts of his intestate. *Robison v. Codman*, 1 Sumn. 121.

[<sup>†</sup> Infant trustees are enabled, by the statute [1 Will. 4, c. 60, which repeals the 7 Ann, c. 19, and the subsequent acts] to convey lands whereof they are seised in trust under the direction of the Court of Chancery. Tit. 32, c. 2.]

*dice the cestui que trust*; nor will the forbearance of trustees, in not doing what it was their duty to have done, affect the *cestui que trust*; since in that case it would be in the power of trustees, by delaying to do their duty, to affect the rights of other persons. Wherefore, the rule in all such cases is, that what ought to have been done, shall be considered as done. And so powerful is this rule, as to alter the very nature of things; to make money land, and land money. (a)

10. There is, however, *one exception* to this rule; for if a *trustee* be in the *actual possession* of the estate, which, however, is a case that seldom happens, and *conveys* it, for valuable consideration, to a purchaser, who has *no notice of the trust*, such purchaser will be entitled to hold the estate against the *cestui que trust*; because confidence in the person is still deemed necessary to a trust; and it is a rule in equity, that an innocent person shall not, in general, have his title impeached. (b)

11. If a trustee mortgages the estate to a person who has no notice of the trust, the mortgagee will be allowed to hold  
450 \* against \* the *cestui que trust*; because mortgagees are considered as purchasers, and as having a specific lien on the estate; whereas it has been observed that estates held in trust are not subject to the specialty or judgment debts of the trustee. (c)

12. If a *trustee sells* to a stranger, who has no notice of the trust, and afterwards *repurchases* from the stranger for a valuable consideration, he will again become *liable to the trust*. (d) <sup>1</sup>

13. Where a purchaser *has notice* of the trust, though he pays a valuable consideration, he shall be subject to it. For, as Lord Hardwicke says: "If a person will purchase with notice of another's right, his giving a consideration will not avail him; for he throws away his money voluntarily, and of his own free will." (e) <sup>2</sup>

(a) 2 P. Wms. 706. 3 P. Wms. 215. *Allen v. Sayer*. Tit. 35. c. 14.

(b) *Millard's case*, 2 Freem. 43.

(c) 1 P. Wms. 278.

(d) *Bovey v. Smith*, 1 Vern. 60, 85, 144. Tit. 35. c. 14.

(e) *Mansell v. Mansell*, tit. 16. c. 7. 3 Atk. 238. *Pearce v. Newlyn*, 3 Madd. 186.

[<sup>1</sup> Where the holder of a mortgage assigned it in trust for the benefit of children, and afterwards accepted a reassignment of it from the assignee in trust, he was held accountable as a trustee to the *cestui que trust*. *Gilchrist v. Stevenson*, 9 Barb. Sup. Ct. 9.]

[<sup>2</sup> *Hallet v. Collins*, 10 How. U. S. 174. Property to which a trust has attached, will be subjected to the trust in the hands of a purchaser for value, who has constructive



14. So, if a trustee conveys an estate to a stranger *without any consideration*; though the person to whom it is conveyed has no notice of the trust, yet he will be liable to it. (a) †

15. We have seen that a purchase from a trustee, with notice of the trust, is a fraud, even though the purchaser should pay a valuable consideration. But where a trustee is *authorized to sell*, such a purchase cannot be fraudulent. There are, however, many cases in which a purchaser, with notice of the trust, is answerable for the trustee, and therefore bound to see that his money is applied in execution of the trust. (b)

16. Thus, where a person conveys or devises his estate to trustees, upon trust to sell it, for payment of *certain debts specified* in the deed or will, or in any schedule thereto annexed; a purchaser will in that case be *bound to see that his money is applied* in payment of those debts. (c) <sup>1</sup>

17. So, where a decree was made for the sale or mortgage of an estate, with a direction that the money should be applied in payment of debts which were *ascertained by the report of the Master*, Lord Hardwicke held, that a purchaser under that decree, was bound to see to the application of his money. (d)

18. *Legacies* stand upon the *same ground* as specified or scheduled debts; therefore, a purchaser must see that his money is applied in payment of them.

19. It is the same where estates are conveyed or assigned to trustees, upon \*trust to sell, and apply the \*451 money for any particular or specific purpose; a purchaser of the estate, with notice of the trust, is bound to see to the application of the money. For if the purposes to which it is directed are not fulfilled by the trustees, the estate will be still liable to them, in the hands of the purchaser.

(a) 2 Salk. 680. 1 Vern. 149.

(b) *Post*, § 30.

(c) *Dunch v. Kent*, 1 Vern. 260. *Spalding v. Shalmer*, Id. 301.

(d) *Lloyd v. Baldwin*, 1 Ves. 173.

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notice of the trust; and this, although it was irregular in the trustee to invest the trust fund in the property. *Heth v. Richmond*, F. and P. R. R. Co. 4 Gratt. 482.]

[<sup>1</sup> *St. Mary's Church v. Stockton*, 4 Halst. Ch. R. 520. A proceeding in equity will not excuse the purchaser from seeing to the application of his purchase-money. *Duffy v. Calvert*, 6 Gill, 487.]

[† With respect to trustees appointed to preserve contingent remainders, their duty will be stated in tit. XVI.]

20. Lands were vested in trustees by act of parliament, to raise a sum of money by mortgage to rebuild a printing-house. It was decreed that the mortgagee was bound to see the money applied accordingly. (a)

21. It is a very common practice to direct the money arising from the sale of lands to be invested in the funds in the names of the trustees, upon several trusts; nor does it appear to have ever been judicially settled, to what extent a purchaser is bound to see to the performance of such a trust. In a case of this kind, the late Mr. Booth says:—"I am of opinion that all that will be incumbent on the purchaser to see done in this case, will be to see that the trustees do invest the purchase-money in their own names in some of the public stocks or funds, or on government securities. And in such case, the purchaser will not be answerable for any non-application (after such investing of the money) of any moneys which may arise by the dividends of interest, or by any disposition of such funds, stocks, or securities; it not being possible that the testator should expect from any purchaser, any further degree of care or circumspection, than during the time that the transaction for the purchase was carrying on. And therefore the testator must be supposed to place his sole confidence in the trustees. And this is the settled practice in these cases. And I have often advised so much, and no more, to be done; and particularly in the case of the trustees under the Duchess of Marlborough's will." Mr. Wilbraham is said to have been of the same opinion. (b)

22. On the other hand, it has been long fully established, that where lands are vested in trustees, to be sold for payment of debts generally, without any specification of such debts, a purchaser is not bound to see to the application of his purchase-money. (c)

23. It is the same where lands are charged with the payment of debts generally. Lord Eldon has said, that a charge is a devise of the estate, in substance and effect, *pro tanto*, upon trust to \*pay the debts. And in another case, he said, it had been long settled, that where a man by deed or will charges

(a) Cottrell v. Hampton, 2 Vern. 5.

(b) Cases & Opin. Vol. II. 114.

(c) 1 Vern. 261. 1 Bro. C. C. 186. 3 Bro. C. C. 96.

or orders an estate to be sold, for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application. (a)<sup>1</sup>

24. It has been stated that a purchaser is bound to see to the payment of legacies. But where a trust is created for the payment of “*debts and legacies*,” without further specification, a *purchaser is not bound* to see that his money is applied in payment of the legacies.<sup>2</sup>

25. A person devised his real estates to trustees, upon trust to sell the same, and out of the money arising from such sale, to pay his own and his father’s “debts and legacies.” Lord Hardwicke said,—“The subjecting the estate to the payment of legacies will not make the purchaser answerable for the disposition of the money; because the legacies cannot be paid without the debts; and they are not specified.” (b)

26. In a modern case, Lord Thurlow said, that where debts and legacies are charged on lands, the purchaser will hold free from the claim of the legatees; for not being bound to see to the discharge of debts, he cannot be expected to see to the discharge of legacies; which cannot be paid till after the debts. (c)

27. Where a person devised his estates to his executors, to be sold for payment of debts, in case his personal estate should prove deficient; it was held that a purchaser was not bound to inquire whether there was a deficiency of the personal estate or not. For if the personal estate was sufficient, yet he should hold the lands purchased, against the heir; and the heir should have his remedy against the executor. But if there be a *lis pendens* between the heir and executor, to have an account, it is sufficient notice in law, without actual notice of the suit; so that a purchaser takes it at his peril. (d)

(a) Amb. 677. 6 Ves. 654, n. 7 Ves. 323.

(b) Rogers v. Skillicorne, Amb. 188.

(c) Jebb v. Abbott, 1 Bro. C. C. 186, n. 2d ed.

(d) Culpepper v. Aston, 2 Cha. Ca. 115. Vide Fearn’s Opin. 121, *contra*.

[<sup>1</sup> Goodrich v. Porter, 1 Gray, 567.]

[<sup>2</sup> Where a will directed lands to be sold by the executors, and the proceeds to remain in their hands, and they to pay interest annually to the wife for her life, and the principal at her death to her children, a *bonâ fide* purchaser from the executors, who paid them the purchase-money, was held not bound to see that it was properly applied to the purpose of the trust. Hauser v. Shore, 5 Ired. Eq. 357. See Rutledge v. Smith, Busbee, Eq. 283.]

28. It has been long settled, that where lands are conveyed to trustees, *in trust to sell and pay debts*, if *more is sold than is sufficient* to pay the debts, that shall not turn to the prejudice of the purchaser; for he is not obliged to enter into the account; and the trustees cannot sell just as much as is sufficient to pay the debts. (a)

29. In a case where lands were directed by will to be sold for payment of debts, and a decree made in Chancery, that the estate should be sold for that purpose; a purchaser under the 453 \* \* decree refused to complete his purchase, because more of the estate was sold than was necessary. Lord Thurlow said,—“If the Master, in selling the whole, has consulted the convenience of the estate, he has acted right. The power given to the trustees was to sell the whole, or such part as might be expedient. The Court has decreed in the same way; and the Master, with the consent of the parties interested, has sold the whole. A purchaser cannot come in to object to it.” The objection was overruled. (b)

30. An opinion has long prevailed, that in all cases where lands are *vested in a trustee to be sold*, the trustee is *competent to give a discharge* for the purchase-money; and that *the rule affecting a purchaser with the misapplication of the trust-money, only applies where there is no hand appointed to receive it*; as in the case of a specific charge on the lands in the hands of the heir or devisee; there a purchaser, dealing with such heir or devisee, is bound to see that such charge is satisfied. This opinion is founded on the following authorities.

31. A person limited an estate to trustees, for payment of debts and legacies. The trustee raised the whole money, and the heir prayed to have the land. This was opposed, because the trustees had not applied the money, but converted it to their own use; so that the debts and legacies remained unpaid. It was determined by the House of Lords, that the heir should have the land discharged, and the legatees should take their remedy against the trustees. For the estate was debtor for the debts and legacies, but not for the faults of the trustees; therefore it was only liable so long as the debts and legacies should or might

(a) 1 Vern. 303.

(b) Lutwych v. Winford, 2 Bro. C. C. 248.

be paid. Where the land had once borne its burden, and the money was raised, it was discharged, and the trustees liable. (a)

32. A purchaser objected to the title to an estate which was vested in a trustee, in trust to sell, and to divide the money amongst the children of certain persons; on the ground that he would be liable to encounter the inconveniences of seeing to the application of his purchase-money. Lord Thurlow decreed a specific performance of the agreement, and refused to give the purchaser his costs. (b)

33. Lord Kenyon, when Master of the Rolls, inclined strongly to the opinion, that where trustees have power to sell they must have the power incident to the character, namely, the \* power to give a discharge for the purchase-money. And \*454 in a late case, where a purchaser objected to a title, on the ground that he was bound to see to the application of the money, Sir W. Grant overruled the objection upon another ground, but said:—"I think the doctrine upon that point has been carried farther than any sound equitable principle will warrant. Where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice. But where the sale is made, by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase-money. (c)

34. It is the usual practice to insert a clause in all deeds and wills, by which trustees are enabled to sell lands, declaring that their receipt shall be a sufficient discharge to the purchasers, who shall not be answerable or accountable for the misapplication or non-application of the purchase-money. And it is fully settled that where a clause of this kind is inserted in a deed or will, by which trusts are created, the trustees may make a good title to a purchaser. But in a case of this kind, all the trustees must join in the receipt.

35. Mrs. Crewe conveyed an estate to the use of herself for life, remainder to three persons, their heirs and assigns, in trust to sell; with a proviso, that the receipts of those three persons

(a) Anon. 1 Salk. 153.

(b) Cuthbert v. Baker, Trin. 1790. Sugd. Vend. 378, 3d ed.

(c) 4 Ves. 99. Balfour v. Welland, 16 Ves. 151. Sowarsby v. Lacy, 4 Mad. 142.

be a sufficient discharge to the purchasers. One of the trustees died; another refusing to act, conveyed his interest to the remaining trustee, who sold the estate. The purchaser refused to take the title unless the trustee who had conveyed his interest, would join in the receipt for the purchase-money, which he declined. Lord Rosslyn said, he must allow the objection; if the trustee had renounced, he might dissent; for then the whole estate would have been in the remaining trustee. But according to the way they managed it, he had accepted the trust and conveyed away the estate. That part of the trust that consisted in the application of the money, he could not convey away. The purchaser taking the title with the knowledge of the trust, would be bound to see to the application of the money. (a)

455 \* [36. In a later case, Lord Eldon, C., decided that \* where a trustee executes no other act than a conveyance to his co-trustees, the meaning and intent of that conveyance being a disclaimer, the release shall operate as such disclaimer; and the disclaiming trustee need not join in receipts for the purchase-money. This was the case of a will, declaring that the receipts in writing of the trustees or trustee, for the time being, should be discharges. (b) <sup>1</sup>

37. Trustees have all *equal power, interest, and authority*; they cannot act separately, but *must all join*, both in conveyances

(a) Crewe v. Dicken, 4 Ves. 27.

(b) Nicolson v. Wordsworth, 2 Swan. 365. See also 3 Bar. & Ald. 13.

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<sup>1</sup> In regard to the application of the purchase-money, the principle of the English cases seems to be this; that where the objects of the trust are limited and defined, so that the trustee has no other duty than to receive the money and immediately pay it over to a hand already designated and capable to receive it, the purchaser is responsible to see that it is so paid. But if the trust is general and undefined, or the nature of it requires that the money should remain in the trustee's hands for a season for any other purpose, or subject to any lien or unliquidated deduction in his behalf, the purchaser is not bound to see to the application of it. If the trustee sold to pay his own debt, or otherwise in breach of the trust, the purchaser, having notice of the fact at the time, is liable. See 2 Story, Eq. Jur. § 1127—1135, and cases there cited. In the United States, this doctrine has rarely been administered, except in cases of fraud, in which the purchaser was a coadjutor; the general rule here being, that the purchaser, who in good faith pays the purchase-money to the person authorized to sell, is not bound to look to its application; and that there is no difference in this respect between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee to be sold for that purpose. Potter v. Gardner, 12 Wheat. 498, 502; 3 Mason, R. 218, S. C. And see Andrews v. Sparhawk, 13 Pick. 393, 401.

and receipts. But although two trustees join in a receipt, where the money is in fact paid to one of them only, yet the trustee who actually received the money will in general only be accountable, [unless the concurrence of the others involves in it culpable negligence.] (a)<sup>1</sup>

38. In all modern deeds by which trusts are created, a clause is inserted that each trustee shall be accountable for such sums only as shall actually come to his hands. And it has been determined in a modern case, that this does not bind the trustees as a covenant, but is a clause of indemnity; and the sense of it is this, that the trustees and their heirs shall not be accountable for more than they receive. (b)

39. The Court of Chancery will *not* in any case permit a trustee to *derive a benefit from the trust*. Therefore, if a trustee compounds a debt, or buys it for less than is due upon it, he shall not derive any advantage to himself from such a transac-

(a) *Fellows v. Mitchell*, 1 P. Wms. 81. Treat. of Eq. B. 2. c. 7. s. 5. (*Sinclair v. Jackson*, 8 Cowen, 548, 583.) 3 Sim. 265. Lewin on Trusts, p. 266. Story on Agency, § 42.

(b) *Bartlett v. Hodgson*, 1 Term R. 42.

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<sup>1</sup> It is agreed, as a general rule, that trustees are responsible only for their own acts, and not for the acts of each other. 2 Story, Eq. Jur. § 1282; 4 Kent, Comm. 307, note (c) 5th ed.; *Ward v. Lewis*, 4 Pick. 518; 1 Sand. on Uses and Trusts, p. 445, 5th ed. To this rule there are several exceptions, all of which may be referred to one or the other of these two principles; *First*, where the act was the joint act of both or all the trustees; for then each identifies himself with each and all of the others. Such is the case where they jointly receive money. Of such joint liability, the giving of a joint receipt is *primâ facie* evidence, but not conclusive; for it may be rebutted by showing that their joining in the receipt was necessary, or was merely formal, and that the money was properly and in fact received by one alone. *Secondly*, where the party charged has himself been guilty of some neglect or violation of duty in regard to the matter complained of; as for example, where he has negligently suffered his companion to receive and waste the trust funds, when, by the exercise of reasonable care and diligence, he might have prevented it; or where, by the positive act, direction, or agreement of one trustee, the money comes into the hands of the other, when it might and should have been controlled or secured by both. 2 Story, Eq. Jur. § 1281—1284; 4 Kent, Comm. 307; *Monell v. Monell*, 5 Johns. Ch. 283, 296; *Willis on Trustees*, 194—196; *Hewett v. Foster*, 6 Beav. 259; [*Wilbur v. Almy*, 12 How. U. S. 180; *Ridgeley v. Johnson*, 11 Barb. Sup. Ct. 527; *Latrobe v. Tiernan*, 2 Md. Ch. Dec. 474; *Royall v. McKenzie*, 25 Ala. 363; *State v. Guilford*, 18 Ohio, 500; *Husband v. Davis*, 4 Eng. Law & Eq. Rep. 342.] In England, a joint receipt, given by several executors, is held conclusive against all; but in the United States, though cogent evidence, it is not universally held conclusive. 2 Story, Eq. Jur. § 1281. [Where a trust is appointed for private purposes, all the trustees must join in receipts for money, but in cases of public trusts, a majority of the trustees will be sufficient. *Hill v. Josselyn*, 13 S. & M. 597.]

tion.<sup>1</sup> But where a trustee releases or compounds a debt, if it appear to have been done for the benefit of the trust, the trustee will be excused. (a)

40. Wherever trustees are *guilty of a breach of trust*, the Court of Chancery will *compel them to reimburse the cestui que trust*, for any loss which he may have sustained. Thus, if a trustee sells the estate, he will be compelled in equity to make a full compensation to the *cestui que trust*. And if a trustee conceals any act done by a co-trustee, which amounts to a breach of trust, he will thereby make himself equally liable. (b)<sup>2</sup>

41. Lord Hobart is said to have been of opinion, that an action at law might be maintained against a trustee for breach of trust. This is not consistent with Lord Hardwicke's definition of a trust; namely, that it is such a confidence between parties, that no action at law will lie; but is merely a case for  
456\* the consideration \* of a court of equity. It is, however, observable, that even in equity the *cestui que trust* is considered only as a simple contract creditor, in respect of such

(a) 3 P. Wms. 251. *Forbes v. Ross*, 1 Bro. C. C. 130.

(b) *Smith v. French*, 2 Atk. 243. *Boardman v. Mossman*, 1 Bro. C. C. 68.

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<sup>1</sup> *Green v. Winter*, 1 Johns. Ch. R. 26; *Van Horn v. Fonda*, 5 Johns. Ch. R. 388, 409; *Evertson v. Tappan*, Id. 497, 513; *Morret v. Paske*, 2 Atk. 54. So, if a trustee, by means of his situation, obtains the renewal of a lease, he shall hold it for the benefit of the *cestui que trust*. *Holridge v. Gillespie*, 2 Johns. Ch. R. 30; *Wilson v. Troup*, 2 Cowen, R. 195; *James v. Dean*, 11 Ves. 383, 392; *Griffin v. Griffin*, 1 Sch. & Lefr. 352. So, if he should misapply or wrongfully invest or employ the trust funds, the *cestui que trust* may demand either the security or other property in which the funds were invested, or the original capital and interest. *Steele v. Babcock*, 1 Hill, N. Y. Rep. 527. And see *Davis v. Wright*, 2 Hill, S. Car. Rep. 560; *Arnold v. Brown*, 24 Pick. 89, 96; 4 Kent, Comm. 306, 307; 2 Story, Eq. Jur. § 1211, 1261, 1262; *Oliver v. Piatt*, 3 How. S. C. Rep. 333, 401. [If trustees lend money on usurious interest, the profits will enure to the *cestui que trust*. 16 How. U. S. 535.]

<sup>2</sup> [Trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and in breach of trust paid over the trust fund to others, were ordered to make good the same with the costs and interest, the account to be taken with rests. *Hutchins v. Hutchins*, 6 Eng. Law & Eq. Rep. 91. The advice of counsel will not protect a trustee from the failure to discharge his duty properly; but in case of doubt he should apply to a Court of Equity. *Freeman v. Cook*, 6 Ired. Eq. 373. Where the trustee at the instance of the *cestui que trust*, who was a married woman, sold out stock and placed the trust fund in an improper state of investment, he was charged with the amount of the dividends which would have accrued due on the trust fund, had it remained in its original state of investment. *Mant v. Leith*, 10 Eng. Law & Eq. Rep. 123; *Murray v. Feinour*, 2 Md. Ch. Dec. 418; *Hemphill's Appeal*, 18 Penn. State R. (6 Harris,) 303; *Miller v. Whittier*, 36 Maine, (1 Heath,) 577.]



breach of trust; unless the trustee has acknowledged the debt to the trust estate, under his hand and seal. (a)

42. It is usual to insert in all deeds by which trusts are created, a clause that the trustees shall not be answerable for any misfortune, loss, or damage, which may happen in the execution of the trusts, unless they arise from their own wilful default. But courts of equity charge trustees, and also their representatives, with the consequences of a breach of trust, whether they derive a benefit from the trust or not. (b)

43. It is an established rule that a trustee shall have *no allowance for his care and trouble* in the execution of the trust; for on pretences of this kind the trust estate might be impoverished; besides the great difficulty there might be in adjusting the *quantum* of such allowance, as one man's time may be more valuable than another's; nor can there be any hardship in this, because every person who is appointed a trustee may choose whether he will accept the trust or not. (c) <sup>1</sup>

(a) 1 Ab. Eq. 384. 2 Atk. 612. Forrest, 109. 2 Atk. 19. Perry v. Phelps, *ante*, c. 1. § 51.

(b) Montfort v. Cadogan, 17 Ves. 485.

(c) Treat. of Eq. B. 2. c. 7. s. 3. (1 Sand. Uses and Trusts, c. 3. § 9, 16.)

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<sup>1</sup> In the United States, it is now generally considered to be for the advantage of all who are interested in estates held in trust, that for the care and diligence of the trustee in the management of the estate, a reasonable compensation should be made, graduated by his actual labor and service in each particular case. Where no other rule is established, either by statute or settled practice, the case is usually treated by analogy to that of executors and guardians, according to the course of the Courts of Probate, or to that of agents and factors among merchants, as the circumstances of the case may require; and the compensation is allowed accordingly. See *Barrell v. Joy*, 16 Mass. 221; *Gibson v. Crehore*, 5 Pick. 146, 161; Mass. Stat. 1838, ch. 144; *Dixon v. Homer*, 2 Metc. 420; *Pennsylvania*, Rev. Stat. 1836, ch. 451, § 29, Dunlop's edition, p. 687; *Winder v. Diffenderffer*, 2 Bland, Ch. R. 166; *Jones v. Stockett*, Id. 409; *Pusey v. Clemson*, 9 S. & R. 209; *Walker's estate*, Id. 223; *Miller v. Beverley*, 4 Hen. & Munf. 415—419; *Ringgold v. Ringgold*, 1 Har. & Gill, 11; *Wilson v. Wilson*, 3 Binn. 557, 560. In *New York*, the English rule was held by Chancellor Kent to be imperative, as the settled law of the State, in *Manning v. Manning*, 1 Johns. Ch. R. 527, 534; *Green v. Winter*, Ibid. 27. See *post*, tit. 15, ch. 2, § 30, note. [*Barney v. Saunders*, 16 How. U. S. 535; *Sherill v. Shuford*, 6 Ired. Eq. 228; *Raiford v. Raiford*, Ib. 490; *Clark v. Hoyt*, 8 Ib. 222; *De Peyster*, Matter of, 4 Sandf. Ch. 511.]

In England, some disposition to relax the rule seems recently to have been manifested; for though it is held that a solicitor or attorney, being trustee or executor, cannot charge for *professional* services, but only for moneys out of pocket, and services not professional; *New v. Jones*, 5 Monthly Law Mag. 264; *Moore v. Frowd*, 3 My. & Craig. 45; *Jolliffe v. Hector*, 12 Sim. 398; yet it has been conceded that the rule is not

44. But in a case where there was a direction in a will that the trustees should be paid for their trouble as well as expense, and it being objected that this might be of general prejudice, Lord Hardwicke said, this was a legacy to the trustees, to whom the testator might give satisfaction if he pleased. In Sergeant Hall's will, Sir Richard Hopkins's, and the Duchess of Marlborough's, there was a great allowance made to the trustees for their trouble, and no inconvenience; because it could carry it no farther than where there were particular directions. The Master was, therefore, directed to inquire what the trustees might reasonably deserve for their trouble. (a)

45. Two persons, executors and trustees under a will, refused to prove or suffer the *cestuis que trust* to take out administration with the will annexed, until he had executed a deed by which he bound himself to pay £100 to one, and £200 to the other trustee, within six months after they should have exhibited an inventory. Lord Hardwicke decreed that the deed was unduly obtained, and that no allowance should be made to the trustees and executors; observing that the Court would be extremely cautious and wary in establishing any such agreements for extraordinary allowances beyond the terms of the trust. (b) <sup>1</sup>

46. A trustee will, however, be allowed all costs and expenses which he has been put to in the execution of his trust, unless he has been guilty of improper conduct. (c)

47. Thus, if a trustee sues in Chancery for the trust estate, and obtains a decree, with costs, and afterwards the *cestui que trust* exhibits a bill against him for an account of the trust estate;

(a) Ellison v. Airey, 1 Ves. 112.

(b) Ayliffe v. Murray, 2 Atk. 58.

(c) Treat. of Eq. b. 2. c. 7. § 8. (Green v. Winter, 1 Johns. Ch. R. 37. Murray v. De Rottenham, 6 Johns. Ch. R. 67.)

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inflexible, and that in special cases a compensation for such services may be made to him by the Court, by a fixed sum, according to the circumstances of the case. Bainbrigge v. Blair, 8 Beav. 588; 9 Jur. 765; [State v. Platt, 4 Harring. 154; Ohio Co. v. Winn, 4 Md. Ch. Decis. 310; Mayer v. Galluchat, 6 Rich. Eq. 1.]

<sup>1</sup> But he observed also that there might be cases where Chancery would establish such agreements; and it seems that in a special case a trustee may be allowed a reasonable compensation. See Willis on Trustees, p. 148; Marshall v. Holloway, 2 Swanst. 453; Chetham v. Ld. Audley, 4 Ves. 72.

the trustee will be allowed in his disbursements his full costs, and will not be concluded by the costs that were taxed. (a) †

48. It is said by Lord King to be a rule, that the *cestui que trust* ought to save the trustees harmless, as to all damages relating to the trust: therefore, where a trustee has honestly and fairly, without any probability of being a gainer, laid out money, by which the *cestui que trust* is benefited, he ought to be repaid. (b)

49. In all modern deeds whereby trusts are created, there is a clause authorizing the trustees to reimburse themselves all costs and expenses which they shall be put to in the execution of their trust.

50. It was formerly held that a trustee should not purchase any part of the trust estate for himself, on account of the dangerous consequences that might ensue from such a practice.

51. Thus it was declared by Lord Hardwicke that the Court of Chancery will not suffer a trustee to purchase the estate of the *cestui que trust*, during his minority; though the transaction were fair and honest, and as high, or a higher price given than any other person would give. This the Court had always discountenanced, upon account of the general inconvenience that might happen from bargains of this kind. But where there was a decree for sale of a trust estate, and an open bidding before the Master, there the Court had permitted the trustee to purchase; for that was an open auction of the estate.<sup>1</sup> At the same time, he said, the rule of the Court against trustees purchasing did not extend to trusts for persons of full age. (c)

(a) *Amand v. Bradburn*, 2 Cha. Ca. 128. *Trott v. Dawson*, 1 P. Wms. 780. 7 Bro. P. C. 26.

(b) 2 P. Wms. 455.

(c) *Davison v. Gardner*, MSS. R. 1743.

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[† A trustee is, however, liable to costs when incurred through his unreasonable and improper conduct. 1 Russ. & M. 70; Id. 634.] [It is not necessarily sufficient to entitle trustees to their costs of suit, that they have acted under the advice of counsel. *Devey v. Thornton*, 12 Eng. Law & Eq. R. 197.]

<sup>1</sup> The ground upon which Lord Hardwicke here places the rule, has been questioned, as being too narrow; because it does not depend on the sale being public or private, or beneficial or not, to the trustee; but on the general policy of preserving the integrity of the trustee, by putting it out of his power to divest himself of that character in regard to the trust property. See 13 Johns. 222; note (a); *Bergen v. Bennett*, 1 Caines, Cas. 19, per Kent, J. [A purchase of land by a trustee of his *cestui que trust* is not void, but voidable only, at the election of the *cestui que trust*, within a reasonable time. *Costen's Appeal*, 13 Penn. State Rep. (1 Harris,) 292.]

52. In another case, where, on a devise to sell for payment of debts, the trustee himself purchased part; Lord Hardwicke said, he would not allow it to stand good, although another  
 458\* person, \*being the best bidder, bought it for him at a public sale, for he knew the dangerous consequence. Nor was it enough for the trustee to say, you cannot prove any fraud, as it was in his own power to conceal it. But if the majority of the creditors agreed to allow it, he should not be afraid of making the precedent. (a)

53. A trustee, who had acted improperly in other respects, bought a lease, which was part of the trust property, at an appraisement; and afterwards renewed it in his own name. Decreed, that he should be a trustee only, and account for what he purchased (b)

54. In a subsequent case, it was said there was *no general rule* that a trustee to sell *should not himself be the purchaser*; but that he should *not thereby acquire a profit*.<sup>1</sup>

(a) *Whelpdale v. Cookson*, 1 Ves. 9. Vide 3 Ves. 628.

(b) *Killick v. Flexney*, 4 Bro. C. C. 161.

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<sup>1</sup> The general doctrine on this subject has been stated by Mr. Justice Story with great clearness and precision. After having discussed the relation of guardian and ward, with reference to the estate of the latter, he observes that in the case of trustee and *cestui que trust*, "the same principles govern as in cases of guardian and ward, with at least as much enlarged liberality of application, and upon grounds quite as comprehensive. Indeed, the cases are usually treated as if they were identical. A trustee is never permitted to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid, if it were a case of guardianship. A trustee cannot purchase of his *cestui que trust*, unless under like circumstances; or, to use the expressive language of an eminent Judge, a trustee may purchase of his *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances; and it is clear, that the *cestui que trust* intended that the trustee should buy; and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee. But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price or any inequality in the bargain. And, therefore, if a trustee, though strictly honest, should buy for himself an estate of his *cestui que trust*, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not to be permitted to sell to or for himself.

"But we are not to understand, from this last language, that, to entitle the *cestui que trust* to relief, it is indispensable to show, that the trustee had made some advantage, where there has been a purchase by himself; and that, unless some advantage has been made, the sale to the trustee is good. That would not be putting the doctrine upon its

55. An estate was conveyed to six persons, in trust to sell for the benefit of creditors. The estate was put up to auction, and purchased by one of the trustees, who afterwards sold it at a profit. Upon a bill filed by some of the creditors, praying that this purchase by the trustee might be for the benefit of the creditors; Lord Rosslyn said, it was a plain point of equity, and a principle of clear reasoning, that he who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit. The consequence is, beyond doubt, that in whatever shape that profit redounds to him, whether by management, which is the common way, or by superior good fortune, it is not fit that benefit should remain in him. It ought to be communicated to those whose

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true ground, which is, that the prohibition arises from the subsisting relation of trusteeship. The ingredient of advantage made by him would only go to establish that the transaction might be open to the strong imputation of being tainted by imposition or selfish cunning. But the principle applies, however innocent the purchase may be in a given case. It is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the Court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so; and yet the party not have it in his power distinctly and clearly to show it. There may be fraud; and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does, and will permit the *cestui que trust* to come at his own option, and, without showing essential injury, to insist upon having the experiment of another sale. So that in fact, in all cases, where a purchase has been made by a trustee on his own account of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bonâ fide* made or not." 1 Story, Eq. Jur. § 321, 322. See also *Davoue v. Fanning*, 2 Johns. Ch. R. 252, where all the cases are reviewed and the doctrine ably vindicated by Chancellor Kent. *Lazarus v. Bryson*, 3 Binn. 54; *Jackson v. Van Dalfsen*, 5 Johns. 43; *Munro v. Allaire*, 2 Caines, Cas. in Er. 183; *Farnam v. Brooks*, 9 Pick. 212; *Prevost v. Gratz*, 6 Wheat. 481; *Jennison v. Hapgood*, 7 Pick. 1; *Currier v. Green*, 2 N. Hamp. 225; *De Caters v. Le Ray De Chaumont*, 3 Paige, 178; *Jackson v. Walsh*, 14 Johns. 407; *Dorsey v. Dorsey*, 1 Har. & J. 410; *Richardson v. Jones*, 3 Gill & J. 163; *Williams v. Marshall*, 4 Gill & J. 323; *Murdock's case*, 2 Bland, 461; *Carter v. Harris*, 4 Rand. 204, per Carr, J.; 1 Lomax, Dig. 257; 4 Kent, Comm. 438; Story on Agency, § 211—214.

[The rule that a trustee, or person standing in a situation of trust and confidence, shall not purchase or deal with the subject of the trust, for his own benefit, is absolute and universal, and subject to no qualifications or exceptions. *Conger v. Ring*, 11 Barb. Sup. Ct. 356; *Pratt v. Thornton*, 28 Maine, (15 Shep.) 355; *Irwin v. Harris*, 6 Ired. Eq. 215; *Brothers v. Brothers*, 7 Ib. 150.]

interests, being put under his care, afforded him the means of gaining that advantage. The trustee was decreed to account for the profits, with costs. (a)

56. In another case it was resolved, that where a trustee purchases the trust estate, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in reasonable time, to have a resale.

57. A person devised his estate to two trustees, upon trust to sell. One of the trustees purchased part of the estate at auction. A bill was filed by the residuary legatees, praying that the sale might be set aside, and the premises resold. It appeared,  
459 \* \* upon the evidence, that the sale was perfectly fair and open. Sir R. P. Arden, M. R., said, he would lay it down as a rule, that any trustee purchasing the trust property was liable to have the purchase set aside, if in any reasonable time the *cestui que trust* chose to say he was not satisfied; and that the trustee purchased, subject to that equity. And he referred it to a Master to inquire, whether it was for the benefit of the plaintiffs that the premises should be resold. If the Master should be of opinion that it would be for their benefit, then it was declared that they should be resold. (b)

58. In another case, however, Lord Eldon allowed of a purchase, under a trust for payment of debts, by the trustee, as agent for his father, both creditors in partnership, chiefly because the *cestui que trust* had full information and the sole management of the sale; making surveys, settling the particulars, fixing the prices, &c. His lordship said, that a *cestui que trust* may deal with his trustee, so that the trustee may become the purchaser of the estate. But though permitted, it was a transaction of great delicacy, and which the Court would watch with the utmost diligence; so much, that it was very hazardous for a trustee to engage in such a transaction. A trustee might buy from the *cestui que trust*, provided there was a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee should buy; and there was no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee. (c)

(a) *Whichcote v. Lawrence*, 3 Ves. jun. 740. 8 Ves. 345.

(b) *Campbell v. Walker*, 5 Ves. 678. 6 Ves. 625.

(c) *Coles v. Trecothick*, 9 Ves. 234. *Chambers v. Waters*, 3 Sim. 42.

59. In a subsequent case, Lord Erskine confirmed a purchase made by a trustee from the *cestui que trust*, under particular circumstances, with the confirmation and acquiescence of the *cestui que trust*. (a)

60. The case of *Campbell v. Walker* came before Lord Eldon, on an appeal from the Rolls, who affirmed the decree with costs; but said—"The principle has often been laid down, that a trustee for sale may be the purchaser in this sense; that he may contract with his *cestui que trust*; that with reference to the contract of purchase, they shall no longer stand in the relative situation of trustee and *cestui que trust*. And the trustee having, through the medium of that sort of bargain, evidently, \* distinctly, and honestly proved, that he had \* 460 himself removed from the character of trustee, his purchase may be sustained." (b) †

61. Where a *trustee refuses to accept a trust*, the usual practice is to require him to release all his estate and interest to the other trustees; or to execute a deed of disclaimer. Where he releases, he has been considered as having, in the first instance, accepted the trust; and, therefore, as to that part of such trust as consisted of personal confidence, he could not transfer it to the other trustees. (c)

62. It has been stated that the Court of Chancery will not suffer a trust to fail for want of a proper trustee; therefore, if a *trustee refuses to accept of a trust*, that Court will interpose; and either *appoint a new trustee* or *take upon itself the execution of the trust*. (d) <sup>1</sup>

63. A person devised all his lands to two trustees, upon trust

(a) *Morse v. Royal*, 12 Ves. 355.

(b) *Ante*, § 59. 13 Ves. 601.

(c) Tit. 32. c. 27. *Crowe v. Dicken*. *Nielson v. Wordsworth*, 2 Swan. 365. 3 Bar. & Ald. 31. *Ante*, s. 35, 36.

(d) *Ante*, c. 1.

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[† In *Lees v. Nuttall*, 1 Russ. & M. 53, it was decided that if an agent employed to purchase an estate, becomes the purchaser himself, he is to be considered as a trustee for his principal.]

<sup>1</sup> The like power is exercised in Chancery, in the United States, as belonging to its general jurisdiction; but in several of the States the subject is regulated by statutes. See 4 Kent, Comm. 311. In England, provision for the appointment of trustees is made by Stat. 1 Will. 4, ch. 60; which has been held to apply, although the instrument creating the trust contains an express provision for the appointment of new trustees. See *Foxhall, in re*, 2 Phill. 281; *Bowles v. Weeks*, 14 Sim. 591; *Bennett v. Burgis*, 5 Hare, 295; 10 Jur. 153; *Ryley, in re*, 3 Hare, 614. [A Court of Equity will

to sell and pay his debts. One of the trustees desired to relinquish the trust, and the other was willing to accept it. The Court of Chancery directed, that the trustee, who desired to relinquish, should release to the other. (a)

64. In a subsequent case the Court of Chancery *removed a trustee*, though he was willing to act, his co-trustees having refused to join with him in the execution of the trust. (b)

65. In a late case a decree was made that a woman who was a trustee, but who had married a foreigner, should be discharged from the trust, though she denied any intention of quitting the kingdom, and desired to continue in the trust. The Court said there was great inconvenience in a married woman's being a trustee. (c)

66. In all modern deeds of trust there is a proviso, that in case of any of the trustees dying, or being desirous of relinquishing the trust, or becoming incapable<sup>1</sup> of acting; a new trustee shall be appointed, either by the *cestui que trust*, or the other trustees; and that the property shall be conveyed to such new trustees, jointly with the remaining trustees.† Where this clause  
461 \* \* is omitted, the Court of Chancery will appoint a new trustee.<sup>2</sup>

67. By a private act of parliament, estates were vested in three

(a) *Travel v. Danvers*, Finch, 380.

(b) *Uvedale v. Ettrick*, 2 Cha. Ca. 20.

(c) *Lake v. Delambert*, 4 Ves. 592.

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not substitute for a trustee appointed by a will, another, resident in a foreign jurisdiction, without security for the faithful discharge of his duties, and the sureties must be amenable to the jurisdiction of the Court. *Ex parte Robert*, 2 Strobb. Eq. 86. A trustee, who from long continued intemperance, has become unfit to have charge of the trust property, will be removed and a new trustee appointed. *Bayley v. Staats*, 1 Halst. ch. 513; *Jones, Matter of*, 4 Sandf. Ch. 615; *Russell's trust*, 1 Eng. Law and Eq. Rep. 225; *Tyler's trust*, 8 Ib. 96; *Snyder v. Snyder*, 1 Md. Ch. Dec. 295; *Berry v. Williamson*, 11 B. Mon. 245; *Harris v. Rucker*, 13 Ib. 564.]

<sup>1</sup> [The term "incapable," in such connection, has reference to personal incapacity, and the power of appointing a new trustee cannot be exercised where a trustee having become bankrupt, had been indicted for not surrendering, and had gone abroad. *Watts, ex parte*, 4 Eng. Law and Eq. Rep. 67; *Turner v. Maule*, 5 Ib. 222; *Harrison's trusts*, 15 Ib. 345.]

[† Where a trustee of personal property, upon his retiring from the trust, transfers the trust funds to another trustee not duly appointed according to the power, he continues answerable to the *cestui que trust*. *Wilkinson v. Parry*, 4 Russ. 272.]

<sup>2</sup> [An unmarried woman conveyed her real and personal estate to A in trust to pay over the income thereof to her during her life, and on her decease to convey the property as she should appoint; and reserved the power, except while she should be a mar-



trustees, upon trust to sell, &c. Mr. Scott, one of the trustees, being appointed attorney-general of Upper Canada, executed a release. A bill was filed against the two remaining trustees, praying a reference to the Master to appoint a new trustee. It was said to be a common case; and the Court referred it to a Master to appoint a new trustee. (a)

(a) *Buchanan v. Hamilton*, 5 Ves. 722.

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ried woman, to revoke all the trusts conveyed by this settlement, and dispose of the property at her pleasure; and the settlement provided that the said trustee might resign at pleasure, and that the settler might nominate a new trustee, and that said A should transfer all the trust property to such new trustee, who should thenceforth have and exercise all the rights and powers, and be subject to all the duties thereby vested in or imposed upon, said A. It was held that the power of appointment reserved to the settler was not exhausted by one appointment of a trustee on A's resignation, but that on the resignation of such new trustee, she might make another appointment, and that if such appointee was a fit person, the Court would order the trust property to be conveyed to him. *Bowditch v. Banuelos*, 1 Gray, 220.]



# DIGEST

OF

## THE LAW OF REAL PROPERTY.

BY WILLIAM CRUISE, ESQ.

BARRISTER AT LAW.

---

REVISED AND CONSIDERABLY ENLARGED  
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FURTHER REVISED AND ABRIDGED, WITH ADDITIONS AND NOTES FOR THE  
USE OF AMERICAN STUDENTS,

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IN SEVEN VOLUMES.

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### VOLUME II

CONTAINING

Title 13. ESTATE ON CONDITION.

14. ESTATE BY STATUTE MORTGAGE, &c.

15. MORTGAGE.

16. REMAINDER.

Title 17. REVERSION.

18. JOINT TENANCY.

19. COPARCENARY.

20. TENANCY IN COMMON.

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A

# DIGEST

OF THE

## LAW OF REAL PROPERTY.

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### TITLE XIII.

#### ESTATE ON CONDITION.

##### BOOKS OF REFERENCE UNDER THIS TITLE.

- BLACKSTONE'S COMMENTARIES. Book II. ch. 10.  
KENT'S COMMENTARIES. Lect. 57.  
COKE upon LITTLETON, Lib. 3, cap. 5, fol. 201, *a*.—237, *a*.  
THOMAS PLATT. A Practical Treatise on the Law of Covenants. Part I. ch. 2, sect. 5. Id. Part II. ch. 1, 2.  
OWEN FLINTOFF. On the Law of Real Property. Vol. II. Book I. ch. 6.  
RICHARD PRESTON. Essay on Abstracts of Title. Vol. II. p. 185—198.  
COMYNS'S DIGEST. Tit. *Condition*.  
W. SHEPPARD. Touchstone of Common Assurances. Ch. VI.

### CHAP. I.

#### NATURE AND DIFFERENT KINDS OF CONDITIONS.

### CHAP. II.

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### CHAP. I.

#### NATURE AND DIFFERENT KINDS OF CONDITIONS.

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| <p>SECT. 1. <i>Nature of Conditions.</i><br/>3. <i>Expressed or Implied.</i><br/>6. <i>Precedent or Subsequent.</i><br/>9. <i>To what Estate annexed.</i><br/>10. <i>At what Time.</i></p> | <p>SECT. 13. <i>A Condition must Defeat the whole Estate.</i><br/>15. <i>Can only be Reserved to the Donor.</i><br/>18. <i>What Conditions are Void.</i></p> |
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SECT. 19. *Conditions against Law.*20. *Repugnant to the Nature of the Estate.*29. *Whether in such Cases a Bond is good.*34. *Conditions of Non-alienation sometimes good.*38. *But are construed strictly.*42. *Do not extend to an Under-lease.*44. *Unless there are special Words.*SECT. 46. *A Sale by Execution is not an Alienation.*48. *Unless there is Collusion.*50. *A Lease may determine by Bankruptcy.*53. *Conditions against Marriage.*61. *Are construed strictly.*66. *Widows may be restrained from Marriage.*

SECTION 1. A condition is a qualification or restriction annexed to a conveyance of lands, whereby it is provided, That in case a particular event does or does not happen; or in case the grantor or grantee does, or omits to do, a particular act; an estate shall commence, be enlarged, or defeated. *Conditio dicitur cum quid in casum incertum qui potest tendere ad esse, aut non esse, conferitur.* (a)

2. A condition annexed to an estate given, is a divided clause from the grant, therefore cannot frustrate the grant precedent; neither in any thing expressed, nor in any thing implied, which is, of its nature, incident to, and inseparable from, the thing granted. (b)

3. Conditions are either *in deed*, that is, *expressed in the deed* by which they are created; or else *in law*, that is, *implied by the common or statute law*. Thus, where a feoffment or lease is made, reserving rent, payable at a certain day, with a proviso, that if it is not paid on that day, the feoffor or lessor may re-enter; this is a *condition in deed*. (c)

4. Conditions implied are those which are created by the common or statute law, without any express words:—Thus, to the grant of every estate is annexed, by law, a condition implied, that the grantee shall not commit felony or treason. And Lord Coke says, there is a *condition in law* annexed to every estate tail after possibility of issue extinct, estate by the curtesy, in dower for life or years, that if the tenants of these estates alien in fee,<sup>1</sup> or claim in a Court of Record a greater estate, they shall

(a) 1 Inst. 201, u.

(b) Hob. 170.

(c) Lit. s. 325.

<sup>1</sup> This doctrine applies only to alienations by feoffment; and not to deeds of bargain and sale, and other conveyances, which derive their effect from the Statute of Uses. See, on the subject of forfeiture of estates for these causes, *ante*, tit. 3, ch. 1, § 36.



forfeit them; and the persons in remainder or reversion may enter. (a)

5. As to conditions in law, founded upon statutes, it is enacted by the several laws against mortmain, that the grantee of an estate in fee shall not alien it to an ecclesiastical corporation. And by the Statute of Marlbridge, tenants for life and years hold their estates upon condition not to commit waste.

6. Conditions are also *Precedent* or *Subsequent* :—Thus, where a condition must be performed before the estate can commence, it is called a *condition precedent*. But where the effect of a condition \* is either to enlarge or defeat an estate already created, it is then called a *condition subsequent*.<sup>1</sup> \*3

(a) Lit. s. 325. 1 Inst. 233, b.

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<sup>1</sup> Whether conditions are precedent or subsequent, depends on the intent of the parties, to be collected from the nature of the case. The rules for finding the intent are the same with those in regard to covenants; in speaking of which, Lord Mansfield observed, that “their precedency must depend on the order of time in which the intent of the transaction requires their performance.” *Kingston v. Preston*, 1 Doug. 689, 691. These rules, as deduced from all the adjudged cases, have been thus stated by Serj. Williams :—“1. If a day be appointed for the performance of any act, and such day is to happen or may happen before the performance of the act which is the consideration for the first mentioned act, then the covenants are considered mutual and independent, and an action may be brought without averring performance of the consideration; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is when *no time* is fixed for the performance of the consideration. 2. But when the day appointed for the payment of money or performance of an act is to happen after the thing which is the consideration is to be performed, no action can be maintained before performance of the condition. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be brought for a breach of the covenant by the defendant, without averring performance; and when a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should, therefore, be permitted to enjoy that part without either paying or doing any thing for it; and, therefore, the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover damages for not receiving the whole consideration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions and dependent. 5. Where two acts are to be done at the same time, neither party can maintain an action without showing performance or an offer to perform his part.” See 1 Saund. 320, note (4), by Williams; *Tompkins v. Elliot*, 5 Wend. 497, per Savage, C. J. See also *Barruso v. Madan*, 2 Johns. 148, per Spencer, J.; *Brockenbrough v. Ward*, 4 Rand. 352; *Johnson v. Reed*, 9 Mass. 78; *Gardiner v. Corson*, 15 Mass. 500; *Couch v. Ingersoll*, 2 Pick. 292; *Finlay v. King*, 3 Pet. 346, 374; *Howard v. Turner*, 6 Greenl. 106; *Green v. Thomas*, 2 Fairf. 318; *Platt on Covenants*, ch. 2, sec. 5. As to mutual covenants, see farther, *Green v. Rey-*

7. Where a particular estate is limited, with the condition that upon the performance of a certain act, or the happening of a certain event, the person to whom the estate is limited, shall thereupon have a larger estate than what was originally limited to him; such a condition is precedent, and good under certain circumstances, which will be noticed in a subsequent title. (*a*)

8. With respect to the *words* by which conditions may be created, they will be stated hereafter. (*b*)

9. A condition *in deed* may be *annexed to every species of estate* and interest in real property; to an estate in fee, in tail, for life, or years, in any lands or tenements.

10. As to *things executed*, a condition must be created and *annexed to the estate at the time of the making of it*, not at any time after. Therefore, where a condition is made in a separate deed, it must be sealed and delivered at the same time with the principal deed. (*c*)

11. In a celebrated case which was heard in parliament, 2 Rich. II., it appeared that King Edward III. had made a feoffment in fee to the Duke of Lancaster, and others, without any condition; and afterwards required the feoffees to perform certain conditions. All the Judges and Serjeants being summoned, and required to give their opinion on this case, declared that the feoffees were not obliged to perform the conditions; because they were not expressed at or before the time when the feoffment was made. (*d*)

12. As to the *things executory*, such as rents, annuities, [leases,] &c., it is held that a grant of them *may be restrained by a condition created* (by act of both parties) *after the execution of such conveyance*. (*e*)

13. It is a rule of law that *a condition must defeat or determine the whole of the estate*, to which it is annexed; not deter-

(*a*) Tit. 16, c. 2.

(*b*) Tit. 32, c. 25.

(*c*) 1 Inst. 236, b. Shep. Touch. 126.

(*d*) Rot. Parl. vol. 3, p. 61.

(*e*) 1 Inst. 237, a. Shep. Touch. 126, 396. 2 Prest. Con. 199, 1st ed. *Infra*, s. 38, n.

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nolds, 2 Johns. 207; Jones v. Gardner, 10 Johns. 266; Gazley v. Price, 16 Johns. 267; Hardin v. Kretsinger, 17 Johns. 293; [McCullough v. Cox, 6 Barb. Sup. Ct. 386; Houston v. Spruance, 4 Harring. 117;] Hunt v. Livermore, 5 Pick. 395; Pomroy v. Gold, 2 Met. 500; Robertson v. Robertson, 3 Rand. 68; Bean v. Atwater, 4 Conn. R. 3; Sewall v. Wilkins, 2 Shepl. 168; Brown v. Gammon, Ib. 276. See *post*, tit. 32, ch. 25, § 10, note.

mine it in part only, and leave it good for the residue. Therefore if a feoffment be on condition that upon such an event the feoffor shall enter and have the land for a time; or the estate shall be void for part of the time; or a lease be for ten years, provided that upon such an event it shall be void for five years; these conditions are not good. But if a feoffment be made of two acres of land, provided that upon such an event the estate shall be void as to one acre only, this is a good condition. (a)

\* 14. In consequence of this principle, it has been ad- \* 4  
judged that a condition to determine an estate tail, as if the tenant in tail were dead, was void; because the death of a tenant in tail did not determine the estate tail, but his death without issue. (b)

15. A condition or *the benefit of a condition, can only be reserved to the donor, feoffor, or lessor, and their heirs*; not to a stranger. For it is a maxim of law, that nothing which lies in action, entry, or reëntry, can be granted over; in order to discourage maintenance. And when, in the creation of a condition, no words of limitation are mentioned, the law will reserve the benefit of the condition to the heirs of the donor, feoffor, or lessor; for as these are the persons prejudiced by the disposition, it is but reasonable that they should be entitled to the same means of recovering the estate as their ancestors.

16. Thus Littleton says, if a man lets land to another for life, by indenture, rendering rent, with a condition of reëntry in default of payment; if, afterwards, the lessor grants the reversion to a stranger, and the tenant for life attorns, such grantee cannot take advantage of the condition, as the lessor or his heirs might have done, if the reversion had continued in him. But now by the statute 32 Hen. VIII. c. 34, grantees of reversions, and privies in estate, are enabled to take advantage of the breach of conditions, of which an account will be given in the next chapter. (c)

17. In a modern case, where A being possessed of a term for years, assigned his whole interest to B, subject to a right of reëntry, on the breach of a condition, the Court of K. B. held that A might enter for the condition broken, although he had no reversion. (d)

(a) 1 Rep. 86, b. Shep. Touch. 127.

(c) Lit. s. 347.

(b) *Jermin v. Arscott*, 1 Rep. 85. 6 Rep. 40.

(d) *Doe v. Bateman*, 2 Barn. & Ald. R. 168

18. Conditions are sometimes *void in their creation*, as where they are *impossible*, or something is required to be done which is *contrary to the divine or municipal law*.<sup>1</sup> •

19. All the instances of *conditions against law* are reducible under one of these heads:—1. To *do something* that is *malum in se*, or *malum prohibitum*. 2. To *omit something* that is a *duty*. 3. To *encourage such crimes and omissions*. And the law will always defeat conditions of this kind, without any regard to circumstances, being concerned to remove all temptations and inducements to those crimes. (a)

20. A condition, *repugnant to the nature of the estate to which it is annexed*, is void in its creation. Thus, a feoffment  
5\* in fee, \* upon condition that the *feoffee shall not take the profits*, is void, as repugnant and against law; and the estate given is absolute. (b)<sup>2</sup>

21. A lease was made to A, B, and C, with a proviso that if

(a) 1 P. Wms. 189.

(b) 1 Inst. 206, b.

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<sup>1</sup> If the condition is subsequent, and performance is rendered impossible by the act of the feoffee or covenantee, or other party in whose favor it is to be performed, it becomes void. *U. States v. Arredondo*, 6 Pet. 691, 745; *Whitney v. Spencer*, 4 Cowen, 39. If it is impossible at the time of its creation, as, to pay money at a day which is already past, the condition is void; but if it be a mortgage, the remedy in Equity is still preserved. *Hughes v. Edwards*, 9 Wheat. 489, 493.

<sup>2</sup> Where a devise was upon condition that the devisee should *make no change* in the disposition of the estates devised, during his life, the condition was held repugnant to the nature of the estate, and void. *Taylor v. Mason*, 9 Wheat. 325, 350. So, where the testator devised his estate to his children, *in case they inhabit the town of H.*, these words were held void, whether regarded as a condition or a limitation; as being both repugnant to the nature of the estate, and also unreasonable, uncertain, and nugatory; there being no limitation over. *Newkerk v. Newkerk*, 2 Caines, 345. So, if the condition of a devise be that the land shall not be subject to conveyance or attachment, it is a void condition. *Blackstone Bank v. Davis*, 21 Pick. 42. See also *Scovell v. Cabell*, Cro. El. 107; *Hob. 170*; 2 Roll. Abr. 453, 454; 1 Shep. Touchst. 129, 131; *Gray v. Blanchard*, 8 Pick. 284. [A grant was made on the express condition that the grantees, within a limited time, should build and finish, on the granted premises, a church or meeting-house for the public worship of God, and also a suitable dwelling-house for the clergyman, and a school-house, and in case such buildings were not finished within the time, the estate was to revert to the grantors. The buildings were built and finished within the time. The deed contained another and distinct condition that the land thereby conveyed should be forever thereafter appropriated to the maintenance and support of the public worship of God, as therein before specified, and to no other uses or purposes whatever; otherwise to revert, &c. Held, that the last condition was repugnant to the foregoing parts of the deed; and as the former condition was more favorable to the grantees it should stand, and the latter condition be held void. *Canal Bridge v. Methodist Society*, 13 Met. 335.]

C should demand any profits of the lands, or enter into the same during the life of A or B, (who were his father and mother,) that then the estate limited to C should cease and be utterly void. It was resolved that this was a condition, and was void, being repugnant to the estate limited. (a)<sup>1</sup>

22. A condition annexed to the creation of an estate in fee simple, that the tenant *shall not alien*, is void;<sup>2</sup> being repugnant to the nature of the estate; a power of alienation being an incident inseparably annexed to an estate in fee simple. But Littleton says, if the condition be such that the feoffee shall not alien to such a one, naming him, or to any of his heirs, which does not take away all power of alienation, then such condition is good. (b)

23. A condition annexed to the gift of an *estate tail*, that the donee *shall not marry*, is void; for without marriage he cannot have an heir of his body. It would be otherwise if such a condition were annexed to the grant of an estate in fee simple; for in that case a collateral heir may inherit. (c)

24. Whatever is prohibited by law may be prohibited by condition. Therefore, if a feoffment be made in fee, upon condition that the feoffee shall not alien in mortmain, this is a good condition, because such alienation is prohibited by law. Lord Coke observes, that in ancient deeds of feoffment in fee simple, there was a clause—*Quod licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis et Judæis.* (d)

25. If a man makes a feoffment to a husband and wife in fee (tail,) upon condition that they shall not alien; to some intent this is good, and to some intent void.<sup>3</sup> For to restrain an alienation by feoffment or deed is good, because such an alienation is tortious and voidable; but to restrain their alienation by fine,

(a) *Moor v. Savill*, 2 Leon. 132.

(b) Lit. s. 360, 361. 8 Term R. 61. 10 Bar. & Cress. 433. 1 Inst. 223, a. *Doe v. Pearson*, tit. 38, c. 9. (*M'Williams v. Nisby*, 2 S. & R. 513. *Hawley v. Northampton*, 8 Mass. 37.)

(c) Jenk. 243. *Dyer*, 343, b.

(d) 1 Inst. 223, b.

<sup>1</sup> A condition that the lessee shall not sell or dispose of any wood or timber off and from the demised premises, without consent of the lessor, in writing, is held good. *Verplank v. Wright*, 23 Wend. 506.

<sup>2</sup> [A proviso restraining alienation annexed to a life-estate, is void, as much as if annexed to an estate in fee. *Rochford v. Hackman*, 10 Eng. Law & Eq. Rep. 64.]

<sup>3</sup> In the United States, such a condition would probably now universally be held void. *Vid.* tit. 2, ch. 2, § 44.

was repugnant and void;† because it was lawful and unavoidable. (a)

26. If lands be given in tail, upon condition that neither the tenant in tail, nor his heirs, shall alien in fee, or in tail, or for the term of another's life, but only for their own lives, 6\* such a \*condition is good; because these alienations are contrary to the Statute *De Donis*. (b)

27. So, if a person make a gift in tail, upon condition that the donee shall not make a lease for three lives or twenty-one years, according to the statute 32 Hen. VIII., the condition is good; for this power being given collaterally, is not incident to the estate, and may, therefore, be restrained by condition. (c)

28. But where an estate tail was created with a condition that the tenant in tail should not suffer a common recovery, the condition was void; because the right to suffer a common recovery, was an incident inseparably annexed to an estate tail, [previously to the recent statute.] (d)

29. Lord Coke says, although a condition repugnant to the nature of the estate granted is void; yet that in all such cases *a bond*, by which the obligor is restrained from doing that which the nature of the estate granted entitled him to do, will be *good*. Thus, if a feoffee in fee becomes bound in a bond not to take the profits of the land, or not to alien the estate, such a bond would be good.<sup>1</sup> And the same law was held by the Court of Chancery in the following case. (e)

30. A father settled lands upon his son in tail, and took a bond from him that he would not dock the entail. On a bill to be relieved against this bond, the Court held it good; because, if the son had not agreed to give the bond, the father might have made him only tenant for life. (f)

31. This doctrine appears *extremely questionable*, as it offers an obvious mode of restraining a person from those rights over an estate which the common law gives him; consequently, of

(a) 1 Inst. 223, b.

(b) Lit. s. 362. Tit. 2, c. 2.

(c) 1 Inst. 223, b.

(d) 1 Inst. 223, b. Stat. 3 & 4 Will. 4, c. 74.

(e) 1 Inst. 206, b.

(f) Freeman v. Freeman, 2 Vern. 233.

[† Before the Stat. 3 & 4 Will. 4, c. 74.]

<sup>1</sup> This distinction is now exploded; for whether alienation by a tenant in fee simple be restrained by a condition or a covenant, it is equally against the policy of law, and in either case void. See Platt on Covenants, part 6, ch. 1; *The Blackstone Bank v. Davis*, 21 Pick. 42; *M'Williams v. Nisby*, 2 S. & R. 513.

frustrating the common law, as fully as if a condition of this kind were allowed to be inserted in a conveyance of land; and, in some cases, it appears not to have been allowed.

32. Thus, where an elder brother voluntarily gave land to his second brother, and the heirs of his body, remainder to a younger brother in like manner; and made each of them enter into a statute with the other, that he would not alien, &c.; but because these statutes were, in substance, to make a perpetuity, they were ordered to be cancelled by the Court of Chancery, with the advice of Lord Coke. (a)

33. So, where A settled lands on B in tail, with remainder to his own right heirs, and took a bond from B not to commit \*waste, the bond being put in suit, it was decreed to \*7 be delivered up to be cancelled; the Court saying it was an idle bond. (b)

34. It was formerly held that if a lease was made to a man and his assigns, he could not be restrained from alienation; but if the word *assigns* was omitted, he might then be restrained. It is, however, laid down by Lord Coke, that if a person made a lease for life, or years, with a *condition that the lessee should not grant over* his estate, or let the lands to any other person, it would be *good*; and this doctrine is now fully established. (c) <sup>1</sup>

35. A lease was made for years upon condition that the lessee, his executors or assigns, should not alien, without the assent of the lessor. The lessee died intestate; the ordinary granted administration to J. S., who assigned the lease without license. It was adjudged that the condition was broken, for J. S. was an assignee in law. (d)

36. A condition annexed to an estate for years, that if the lessee, his executors or assigns, did demise the land for more than from year to year, then the lease should cease, and be void, was held to be good. (e)

(a) Poole's case, Moo. 810.

(b) *Jervis v. Bruton*, 2 Vern. 251.

(c) Hob. 170. 1 Inst. 204, a. 223, b.

(d) *Moore's case*, Cro. Eliz. 26.

(e) *Berry v. Taunton*, Cro. Eliz. 381.

<sup>1</sup> A condition that the lessee shall not permit more than one family to every one hundred acres to reside on the land, is good. *Jackson v. Brownell*, 1 Johns. 267.

[A condition in a deed that only one single dwelling-house shall be erected on the granted land, is broken by the erection of a building adapted for the accommodation of several families, in distinct tenements, under one roof. *Gillis v. Bailey*, 1 Foster, (N. H.) 149.]

37. A condition was inserted in a lease for years, that if the lessee, his executors or administrators, at any time, without the assent of the lessor, his heirs or assigns, did grant, alien, or assign the land, or any part thereof, that then it should be lawful for the lessor and his heirs to reënter. This was held to be a good condition. (a)

38. Conditions of *this kind* are, however, *not favored*; for they are held to *affect the original lessee only*, and *not* to extend to his *assignees*. So, that if a lessee who is restrained from alienation, by a condition of this kind, assigns over his term, with the consent of the lessor, such assignee may assign to any other person, without further consent. †

39. The president and scholars of a college at Oxford made a lease for years to one Bold, with a proviso that the lessee  
8\* or his \* assigns should not alien the premises to any person or persons, without the special license of the lessors. Afterwards, the lessors, by their deed, licensed the lessee to alien or demise the land to any person or persons whatever. The lessee assigned the term to one Tabbe, who devised it to his son, who was also his executor. The son entered generally, died intestate, and his administrator assigned the term to the defendant. The president and scholars entered for the condition broken. It was resolved that the alienation by license to Tabbe had determined the condition; so that no alienation afterwards made by him could be a breach of the proviso, or give the lessors a right of entry; for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. (b)

40. George Fox, lessee for ninety-nine years, by indenture, rendering rent, covenanted that he would not alien or assign his term, or any part thereof, to any but his brothers. The lessee

(a) Pennant's case, 3 Rep. 64. (Jackson v. Brownson, 7 Johns. 232.)

(b) Dumpor's case, 4 Rep. 119.

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[† A dispensation of a condition once granted, is an entire dispensation, so that by a license to assign once given, the restraint upon alienation ceases. Dumpor's case, *ubi supr.*, and Brummell v. Mackpherson, 14 Ves. 173. But under the learning of Defeasance, a mode may be resorted to, by which the objection generally made to give a license to assign can be obviated; on the assignment with license, a deed of Defeasance should be executed in order to determine the lease on alienation by the assignee. See Shep. Touch. 195; 2 Prest. Con. 199, 1st ed. and Appendix, Form 7.]



assigned the term to one of his brothers, who assigned it over to a stranger. It was resolved,—1. That this was a condition, and not a covenant. 2. That the assignee was not within the condition; but might alien to whom he pleased. (a)

41. In the case of *Berry v. Taunton*, the condition was held to be broken by a devise of the land to the lessee's son. But in a subsequent case, where a lessee for years covenanted with the lessor not to assign over his term, without the lessor's consent in writing; and, afterwards, without such consent devised the term to J. S.; it was said that this was not a breach of the covenant, for a devise was not a lease. (b)

42. Where there is a condition in a lease, that the *lessee shall not assign it over*, without the permission of the lessor; *an under-lease* has been adjudged *not to be within the condition*.<sup>1</sup>

43. In a lease for twenty-one years, there was a covenant from the lessee, that he would not “assign,† transfer, or set over, or otherwise do or put away the said indenture of demise, or the premises thereby demised, or any part thereof, to any person or

(a) *Whichcot v. Fox*, Cro. Jac. 398.

(b) (*Berry v. Taunton*, Cro. El. 331.) *Ante*, s. 36. *Fox v. Swann*, Styles, 483. ■

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<sup>1</sup> Where the condition was, that the lessor “shall not assign over, or otherwise part with this indenture, or the premises thereby leased, or any part thereof, to any person,” &c.; these words were interpreted to mean an assignment of the premises or a part of them for the whole term; and no forfeiture was incurred by an under-lease for a shorter period. *Jackson v. Harrison*, 17 Johns. 66, 70. And where a lease for life was granted, upon condition that the lessee should not sell or dispose of *his estate* in the premises without permission of the lessor, it was held, that a lease for twenty years was no forfeiture; the condition applying only to an alienation of his entire freehold estate. *Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Brownson*, 7 Johns. 227. [A condition in a lease, that it shall be void if the lessee assigns, is valid; but a lessee under such a condition may associate others with himself in the enjoyment of the term, or may make a sub-lease. *Hargrave v. King*, 5 Ired. Eq. 430.] But in these and the like cases, there must be in the lease a clause of reëntry for breach of the condition; otherwise an assignment of his whole estate in the premises is no forfeiture of the title of the lessee, but only a ground to claim damages against him. *Doe v. Phillips*, 2 Bing. 13; *Spear v. Fuller*, 8 N. Hamp. 174; *Platt on Covenants*, 424.

[A condition in a lease, that if the rent shall be in arrear, or if the lessee shall neglect or fail to perform and observe any of his covenants therein, the lessor may, while such default continues, enter, &c., applies to a covenant that the lessee shall not occupy the buildings, or in any manner suffer them to be occupied for dwellings or for any unlawful purpose. Such covenant runs with the land, and is binding upon the estate in the hand of the sub-tenants of the lessee, whose use of the same for an unlawful purpose will be a breach of the covenant, and work a forfeiture. *Wheeler v. Earle*, 5 Cush. 31.]

[† A covenant not to let, set, or demise the premises or any part thereof, for all or any part of the term, restrains an assignment. *Greenaway v. Adams*, 12 Ves. 395.]

persons whomsoever, without the license and consent of the lessor.” The lessee demised the premises for fourteen years, without any license; it was held that this underlease was not  
 9 \* a \*breach, for the Courts had always looked nearly into these conditions. (a)

44. But if a lease contains a *proviso* that the lessee, his executors or administrators, shall not let, set, or assign over *the whole or any part of the premises, without leave in writing* from the lessor, on pain of forfeiting the lease; an *administrator* of the lessee *cannot make an underlease*. Nor would a *parol license* to let part of the premises discharge the lessee from this restriction.

45. William Gregson demised the premises in question to S. Harrison, his executors, &c. for twenty-one years, with a proviso that in case the said Harrison, his executors, or administrators, should at any time during the said term *set, let, or assign over* the demised messuage, *or any part thereof*, without the license and consent of Gregson, his executors, administrators, or assigns, for that purpose first had and obtained *in writing*, the lease should be absolutely null and void; and the lessor might enter. The lessee entered and died; the defendant took out administration to him, became possessed of the demised premises, and made a lease of them for nine years. The landlord died, having devised the premises to the lessor of the plaintiff, who brought an ejectment to recover them, as being forfeited by the lease made by the administrator. The defendant proved that Gregson, the lessor, gave liberty by *parol* to Harrison the tenant, to let *the stable, being part of the premises* demised: but refused to give the like liberty to demise any other part of the premises. (It was objected, first, that the covenant only extended to an assignment of the whole term; secondly, that the proviso not to assign did not extend to persons who came into possession by operation of law, but only to prevent an assignment in fact by the party; and thirdly, that the *parol license* to let *part* of the premises destroyed the whole condition. But these objections were overruled, the last being met by the answer that the license, not being in writing, was void; and judgment was rendered for the plaintiff.) (b)

(a) *Crusoe v. Bugby*, 3 Wils. R. 234. 2 Black. R. 766.

(b) *Roe v. Harrison*, 2 Term R. 425. *Lloyd v. Crisp*, 5 Taun. 249. *Doe v. Worsley*,

46. \* Where a lessee covenanted not to alien or transfer \* 10  
away his lease ; and afterwards acknowledged a judgment,  
on which the lease was *taken in execution* and sold ; it was held  
that this sale was *not a forfeiture* of the lease. (a)

47. On a trial in ejectment, a verdict was found for the lessor  
of the plaintiff, subject to the following case : The lessor of the  
plaintiff demised the premises by lease, in which there was a  
covenant that the lessee, his executors, administrators, or assigns,  
should not let, set, assign, transfer, make over, barter or ex-  
change, or otherwise part with the lease, or the lands, or any  
part thereof, to any person or persons whatever, without the spe-  
cial license and consent of the lessor, his heirs or assigns, with  
a power of reëntry in case of alienation. A creditor of  
\* the lessee took from him a warrant of attorney to confess \* 11  
a judgment, upon which a judgment was entered, and the  
lease was sold by execution to a person who had notice of the  
proviso. The lessor brought an ejectment against the purchaser  
of the lease. Lord Kenyon said there was a distinction between  
those acts which the party does voluntarily, and those which  
pass *in invitum* ; that judgments, in contemplation of law, always  
pass *in invitum* ; that this was not an alienation within the  
meaning of the covenant ; and judgment was given for the  
defendant. (b)

48. But where a warrant of attorney to confess a judgment is  
given by *collusion*, for the purpose of enabling a creditor to take  
a lease in execution, it will be deemed a *breach of a covenant not  
to alien*.

49. In the above case of *Doe v. Carter*, the landlord brought  
a new ejectment ; the jury found the same facts, with this addi-  
tion, that “ the warrant of attorney was executed for the express  
purpose of getting possession of the lease,” and the tenant  
concurred in that intention. Lord Kenyon said : “ When this  
case first came before the Court, the rules that were likely  
to govern it were so explicitly stated, that I thought we should

1 Camp. 20. *Roe v. Sales*, 1 Mau. & Selw. 297. See *Paul v. Nurse*, 8 Bar. & Cress. 486.  
*Macher v. Foundling Hospital*, 1 Ves. & Beam. 191. *Doe v. Bliss*, 4 Taun. 735.

(a) 12 Ves. 519.

(b) *Doe v. Carter*, 8 Term R. 57. *Doe v. Skiggs*, cited 2 T. R. 428. (*Jackson v. Corliss*,  
7 Johns. 531. *Jackson v. Silvernail*, 15 Johns. 278. *Jackson v. Kipp*, 3 Wend. 230. *Doe v.*  
*Hawke*, 2 East, 481.)

have heard no more of it. The covenant not to assign, and the proviso to enforce it, were both legal at the time; and indeed it was prudent for the landlord to take this care, that an improper tenant should not be obtruded on him. When the former question arose, the Court, to a certain degree, relaxed the severity of the covenant, and they then said there was no forfeiture, because all that was stated was, that a fair creditor had used due diligence to enforce the payment of a just debt, and that the lease was taken from the tenant, against his consent, by judgment of law. But when it is now stated that this step was taken for the express purpose of getting possession of the lease, and that the tenant consented to it, it would be ridiculous to suppose that a court of justice could not see through such a flimsy pretext as this. Here the maxim applies, that that which cannot be done *per directum* shall not be done *per obliquum*. The tenant could not, by any assignment, underlease, or mortgage, have conveyed his interest to a creditor; consequently he cannot convey it by an attempt of this kind. If the lease had been taken by a creditor, under an adverse judgment, 12 \* the tenant not consenting, it would not have been a forfeiture; but here the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor."—Judgment was given for the plaintiff. (a)

50. A condition, in a lease for years, that the landlord shall *reënter on the tenant's committing an act of bankruptcy, whereupon a commission shall issue, is good.*

51. It was found by a special verdict, that in a lease for twenty-one years, a proviso was inserted, that if the lessee, his executors or administrators, should commit any act of bankruptcy, within the intent and meaning of any statutes made or to be made in relation to bankrupts, whereon a commission should issue, and he or they should be found or declared to be a bankrupt or bankrupts, then it should be lawful for the lessor to reënter. The lessee became a bankrupt; the question was, whether the lease was thereby determined.

Mr. Justice Ashurst said, the general principle was clear, that the landlord, having the *jus disponendi*, might annex whatever

(a) *Ante*, s. 47. 8 Term R. 300.

condition he pleased to his grant, provided it was not illegal or unreasonable. Then was this proviso contrary to any express law, or so unreasonable that the law would pronounce it to be void? That it was not against any positive law was admitted, and no case had decided it to be illegal. It remained to be considered whether it was void or unlawful, as against reason or public policy. It did not appear to be against either.

\*He was therefore of opinion that it was a valid proviso. \*13 Mr. Justice Buller said, the case had been argued on general principles of inconvenience, because the possession of an estate on such terms enabled the tenants to hold out false colors to the world; but that observation did not apply to the case of land, for a creditor could not rely on the bare possession of the land by the occupier, unless he knew what sort of interest he had in it. If he were desirous of knowing that, he must look into the lease itself; there he would find the proviso, that the tenant's interest would be forfeited in case of his bankruptcy. The stock upon the farm might indeed induce a credit; but that would not govern the present case. It was next urged that this was equivalent to a proviso that the lease should not be seized under a commission of bankruptcy; the defendant's counsel having first supposed the lease to be granted absolutely for a certain term, and then that a subsequent proviso was added to that effect. Such a proviso as that indeed would be bad, because it would be repugnant to the grant itself: but here there was an express limitation that the lease should be void, upon the fact of the lessee's becoming a bankrupt. \*Adjudged that the \*14 condition was good. (a)

52. In many of the cases where a lease may be avoided on breach of a condition, acceptance of the rent will make the lease good. (b)

53. The *ecclesiastical courts*, in conformity with the Roman law, considered all *conditions in restraint of marriage* as contrary to the public good, and therefore void. The *Court of Chancery* first adopted the same doctrine in cases of *legacies*; but always held that a condition annexed to a *devise of land*, or of any in-

(a) *Roe v. Galliers*, 2 Term R. 133. *Doe v. Clarke*, 8 East, 185. See also *Cooper v. Wyatt*, 5 Mad. 482, 490. 1 Swan. 481. (2 Ad. & El. 317, N. S. *Butterfield v. Baker*, 5 Pick. 522.)

(b) Tit. 32, c. 5.

terest arising out of land, *not to marry without consent*, was good;<sup>1</sup> that where such a condition was precedent, the estate did not vest till the condition was performed; and where it was subsequent, the estate would be divested by the breach of the condition.

54. Lord Newport devised an estate to his wife, for her life; after her death, to his granddaughter, Lady Ann Knowles, and the heirs of her body; provided and upon condition that she married with the consent of his wife, the Earl of Warwick, and the Earl of Manchester. In case she married without such consent, then he devised the premises to another person. The granddaughter married without consent. It was decreed by Sir H. Grimstone, M. R., that the condition was *only in terrorem*, and the estate not forfeited. Upon an appeal, Lord Keeper Bridgeman, assisted by Keeling, Vaughan, and Hale, reversed the decree. Hale said, that though by the civil law, in a case of mere personalty, such a limitation over would be void; yet this, being a devise of lands, was not to be governed by that law. (a)

55. Mr. Cary devised his estate to trustees and their heirs, in trust for Elizabeth Willoughby, for her life, in case that within three years after the testator's death she married Lord Guilford: but in case the marriage did not take effect within that time, then he devised the estate to Lord Faulkland. Upon the death of the testator, proposals of marriage were made by Miss Willoughby's \* friends to Lord Guilford, which being refused, she married Mr. Bertie. Lord Somers, assisted by Justices Holt and Treby, held, that as this was a good condition precedent, and not performed, no relief could be given to the young lady; that the estate must go over to the next in remainder, this being a condition of marriage, which was a thing that could not be valued. (b) It appears from the Journals, that this decree was reversed in the House of Lords. (c)

56. J. S. charged his real estate with £500 to be paid to his sister, Alice Herne, within one month after her marriage, but so nevertheless as she married with the approbation of his brother, if living; and in case she married without his consent, the £500

(a) *Fry v. Porter*, 1 Cha. Ca. 138. 1 Mod. 300.

(b) *Bertie v. Faulkland*, 3 Cha. Ca. 129.

(c) Vol. 16, 230, 236—238, 240, 241.

<sup>1</sup> The reason was, that land was governed by the rules of the feudal law, which permitted restraints of marriage without consent.

was not to be raised. Alice Herne married in the lifetime of her brother, without his consent. The question was, whether she was entitled to the £500 or not; for it was said that this was a condition only *in terrorem*; that the construction of such a condition always had been, where there was no devise over, that such a condition was void; otherwise where limited over; and here it was not. On the other side, it was argued that this was a condition precedent, and nothing arose or became due but upon the marrying with consent; that being a devise of money out of land, or of a charge upon land, it was to be considered as a devise of land, and to be governed by the same rules; then being a plain condition precedent, nothing arose. And for this were cited the two preceding cases. Sir Joseph Jekyll held that the charge being upon land, the case was to be decided by the same rule as if it had been a devise of land; and being plainly a condition precedent, nothing vested: for it would be too hard to charge the land, contrary to the express will of the testator; and to say, the money should be raised, when the testator said it should not. Decreed accordingly. (a)

57. The validity of conditions *in restraint of marriage without consent* was also established, in the case of a trust term, created for the purpose of raising portions for daughters, by the following determination.

58. Sir Thomas Aston settled his estate to the use of himself for life, remainder to trustees for a term of years, upon trust, in case he should have no son, and should have two daughters, living at the time of his death, that the trustees of the term should raise for such daughters £2000 a-piece, if they married \* with the consent of their mother; and if either \*16 of them died before marriage, with such consent, her portion to cease, and the premises to be discharged; or if raised, then to be paid to the person to whom the premises should belong. Sir T. Aston gave, by his will, to each of his daughters, an additional portion of £2000, subject to the like condition as in the settlement. He died, leaving two daughters, who married without the consent of their mother; and afterwards filed a bill in Chancery against the trustees of the term, and their father's executors, to have their portions raised. It was answered, that

(a) *Reeves v. Herne*, 5 Vin. Ab. 343. 4 Geo. 2.

the two daughters had married without the consent of their mother, although they and their husbands were informed, previous to their respective marriages, of the clause by which they were restrained from marrying, without such consent.

Sir Joseph Jekyll decreed that the plaintiffs were entitled to their original portions, as well as to the additional portions given by the will.

Upon an appeal, Lord Hardwicke, assisted by Lord Chief Justice Willes, Lord Chief Justice Lee, and Lord Chief Baron Comyns, determined that the daughters of Sir Thomas Aston were not entitled to these portions, in consequence of their marriage without their mother's consent.

Lord Chief Justice Lee said, there were three sorts of conditions to be rejected. 1. Such as were repugnant. 2. Such as were impossible in their creation. 3. Such as were *mala in se*. But this condition of marrying with consent did not come under any of those heads; and in *Fry v. Porter* it was admitted that such a condition was good in respect of land. That though where a compensation could be made, it was true there was but little difference between conditions precedent and subsequent, yet where a condition was annexed to a portion, in order to have a marriage with consent, there was an equitable difference. In the case of a condition subsequent, the thing was vested; and though in the nature of a penalty, yet the intent should be clear and plain, by an express devise over to divest; but in the case of a condition precedent, for which there could be no compensation,<sup>1</sup> it would be giving an estate against the intent of the donor, to dispense with the condition. There were

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<sup>1</sup> If the learned Judge meant to confine his observation to *that class* of conditions precedent, for the breach of which, from their *nature*, no compensation can be made, because there is no rule by which damages can be computed, the remark is still true, as well in Equity as at law. And if the observation is applied to the *vesting of estates*, it is equally true; and in either view, the will in question was drawn with exquisite skill and adroitness. But it is not universally true, at this day, in Equity, that there can be no relief for breach of *any* condition precedent; the rule being, that, where the condition is evidently designed to secure the performance of some collateral act, and the nature of the case is such as to admit of compensation in money, and the damages are capable of computation, there the Court will decree such compensation, though the condition be precedent. At least, such is the rule in regard to penalties; between which, and conditions precedent of the character just mentioned, it is agreed that there is no distinction in principle. See *post*, ch. 2, § 29, note.



no words to vest the portions in the daughters till a marriage with consent; and he very much governed his opinion by the particular penning of the deed, which had made this a condition precedent; and had vested nothing in the daughters till a marriage with consent. Upon the whole, therefore, he was of opinion that a condition to marry with consent was a lawful one; that it was annexed to these portions; that it was a condition precedent, and that nothing could vest in the plaintiffs till that condition was performed. (a)

59. In a subsequent case a woman devised in these words:—"Provided always, and it is my will, if my daughter Mary marry by and with the consent of the trustees, signified in writing before such marriage had, then and not otherwise I give and devise unto my said daughter Mary, the sum of £800;" and charged all her real estates with the payment of her debts and legacies. Mary married without the consent of the trustees, and died soon after; but before her death, the trustees declared their consent and approbation. On a bill filed by Reynish for payment of this legacy, Lord Hardwicke said, as Mary married without the consent of the trustees, their consent or approbation afterwards was immaterial, because no subsequent approbation could amount to a performance of the condition, or dispense with a breach of it.

If the legacy was to be considered as a charge originally upon the lands, it must have the same consideration as a devise of lands would have: in that case nothing could be clearer than that the legacy could not be raised, because nothing vested before the condition performed. (b)

\*60. The Court of King's Bench, upon a case lately \*19 sent out of Chancery, was of opinion that a condition, restraining a lady from *marrying a native of Scotland*, was good. (c)

61. *Conditions in restraint of marriage*, without consent, are, however, so far discouraged by the English law, that they are *construed strictly* in favor of the persons on whom such restraints are laid.

62. J. S. having four daughters, A, B, C, and D, devised several parcels of his estate to his four daughters; and, among other

(a) *Harvey v. Aston*, 1 Atk. 361. Com. R. 726. Willes R. 83. *Ante*, s. 54.

(b) *Reynish v. Martin*, 3 Atk. 330.

(c) *Perrin v. Lyon*, 9 East, 170.

devises, he gave to his trustees his lands in E and F, in trust for his daughter A, until her marriage or death; and in case she married with the consent of the trustees, then to her and her heirs; but in case she should marry without their consent, then to her other sisters equally between them. Three years after the date of the will, A married with the consent and approbation of her father, who settled upon this marriage part of the lands which he had devised to her, and some other property. A year after J. S. died, without having altered his will; it was objected that this was a condition precedent, and until performance the estate could not vest, and that equity ought not to aid in such a case.

Lord Cowper held, that by the marriage, with the consent of the father, the condition was dispensed with, and the devise became absolute; for conditions of this kind, whether precedent or subsequent, were in the nature of penalties or forfeitures. If the substantial part and intent was performed, equity would supply small defects and circumstances, and favor the devisee. Here was no forfeiture; it was never the intent of the testator that the estate should be taken from the first devisee, when it could not go to the devisee over, and be left to descend to the heir at law. (a)

63. A person devised all his lands to one Comyns and his heirs, to the use of him and his heirs, in trust for payment of debts; and afterwards, in trust for his granddaughter Mary, and the heirs of her body, remainder to Comyns and his heirs, upon condition that he should marry the testator's granddaughter Mary. Comyns offered to marry the lady; but she refused, and soon after married another person. (b)

Lord Talbot was of opinion that this was a condition subsequent, and that it was dispensed with by the refusal of the lady. (c)

20\*    \*64. A person devised his estate to trustees, to the use of his son Robert for life, remainder to the wife of such son for life, remainder to the first and other sons of his said son in tail; with a proviso that if the son should marry any woman not having a competent marriage portion, or without the consent and approbation of the said trustees, their heirs and assigns, in

(a) *Clerk v. Lucy*, 5 Vin. Ab. 87.

(c) *Daly v. Desbouverie*, 2 Atk. 261.

(b) *Robinson v. Comyns*, Forrester, 164.

writing, under their hands and seals first had and obtained ; then his trustees, immediately after the decease of his son, should stand seised of the premises, to the use of the testator's two daughters ; and he declared that the said proviso or condition was not intended by him, or to be construed or taken to be *in terrorem* ; but a condition in want of performance whereof, in every respect, the estate should in no case be vested in his son, nor the heirs of that marriage. The son married a woman who had a competent portion, but without the consent or approbation of the trustees. Upon the death of the son, the daughter claimed the estate under the condition in the will. (a)

Lord Mansfield. "Conditions in restraint of marriage are odious, and are, therefore, held to the utmost rigor and strictness ; they are contrary to sound policy ; by the Roman law they are all void. Conditions precedent must previously exist ; therefore, in these there can be no liberality, except in the construction of the clauses. But in cases of conditions subsequent, it has been established by precedents, that where the estate is not given over, they shall be considered as only *in terrorem*. This shows how odious conditions are ; for in reason and argument the distinction between being and not being limited over is very nice ; and a clause can carry very little terror which is adjudged to be of no effect. If the estate is given over, such a condition cannot be got over. The present case is doubly *in terrorem* ; and made so by adding the clause, that the said proviso or condition was not intended by him, nor to be construed nor taken to be *in terrorem*. In the case of *Daly v. Clanrickarde*, in Chancery, 10th December, 1738, (b) the condition was, that he should marry with the consent of trustees ; if not, the estate was given over. The trustees were applied to ; they offered to agree, on a proper settlement being made. The marriage was had without their knowledge ; but the settlement being afterwards made, their conditional consent was holden to be sufficient. In the case of *Bolton et ux. v. Humphries et al.*, 20th Feb., 1755, in Canc., the \*condition was, that if she married \*21 with the consent of N. H. in writing, then, &c., and the estate was given over. She married without his privity ; but he gave his consent as soon as he knew of the marriage. Lord

(a) *Long v. Dennis*, 4 Burr. 2052. (*Parsons v. Winslow*, 6 Mass. 169.)

(b) 2 Atk. 261.

Hardwicke held this a sufficient consent, to entitle her to the real and personal estate, which was given her if she married with the consent and approbation of N. H. to be signified in writing. I mention these cases to show that the Court ought not to make strides in favor of a forfeiture. There can be but one true legal construction of these conditions; and, therefore, it must be the same in the Court of Chancery, and all the other Courts in Westminster Hall. The meaning of the testator, or the control which the law puts upon his meaning, cannot vary, in what court soever the question chances to be determined. In the present case the forfeiture is so cruel as to begin with the innocent issue of the offender, who is to have it for his own life at all events. This testator considered money as the only qualification of a wife; but he still means to leave it to the judgment of trustees, whether there might not be some equivalent for money. He only meant to require their sanction, in case his son married a woman without a competent fortune. This is undoubtedly a condition precedent; it must have been performed before the son could take, before his interest could vest. The construction must be to vest the estate, in case his son married a woman with a competent fortune, *or* had the consent and approbation of his trustees to marry a woman without one. The blunder is in the penning only; the meaning is, that in either event it shall vest; the performance of *either part* of the alternative vests the estate. Here is no objection to the marriage, and one of the trustees is become one of the devisees over; therefore a cause of objection ought to be shown, otherwise it shall be considered as if his consent was withholden without reason. The consequence is, that judgment must be given for the defendant." (a)

The three other Judges concurred in thinking it to have been the intention of the testator that his son's complying with either part of the alternative should be a performance of the condition; that he did not incur a forfeiture, unless he had broken both parts of it; and that conditions in restraint of marriage ought to be construed with the utmost rigor and strictness. (b)

65. In a modern case of personal property, it was held  
22\* that \*the same principles of policy which annul conditions that tend to a general restraint of marriage, will

(a) *Merry v. Reeves*, 1 Cases Temp. North. 1. *Clarke v. Parker*, 19 Ves. 1.

(b) *O'Callaghan v. Cooper*, 5 Ves. 117.

favor and support them, when they merely prescribe such provident regulations and sanctions as tend to protect the individual from those consequences to which an over-hasty, rash, or precipitate match would probably lead. Therefore, if the conditions are only such, whereby a marriage is not altogether prohibited, but only in part restrained; as in respect of time, place, or person; then such conditions are good.<sup>1</sup> An injunction to ask con-

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<sup>1</sup> The general result of the modern English cases on the subject of conditions in restraint of marriage, is stated, by Mr. Justice Story, in the following terms:—"Conditions annexed to gifts, legacies, and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void. And so, if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party, upon whom it is to operate, is unreasonably restrained in the choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry without consent, or should not marry a man who was not seised of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage.

"But the same principles of public policy, which annul such conditions, when they tend to a general restraint of marriage, will confirm and support them, when they merely prescribe such reasonable and provident regulations and sanctions, as tend to protect the individual from those melancholy consequences, to which an over-hasty, rash, or precipitate match would probably lead. If parents, who must naturally feel the deepest solicitude for the welfare of their children, and other near relatives and friends, who may well be presumed to take a lively interest in the happiness of those with whom they are associated by ties of kindred, or friendship, could not, by imposing some restraints upon their bounty, guard the inexperience and ardor of youth against the wiles and delusions of the crafty and the corrupt, who would seek to betray them from motives of the grossest selfishness, the law would be lamentably defective, and would, under the pretence of upholding the institution of marriage, subvert its highest purposes. It would, indeed, encourage the young and the thoughtless to exercise a perfect freedom of choice in marriage; but it would be at the expense of all the best objects of the institution, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality, and filial obedience and reverence. Such a reproach does not belong to the common law in our day; and, least of all, can it be justly attributed to Courts of Equity.

"Mr. Fonblanque has, with great propriety, remarked: 'The only restrictions, which the law of England imposes, are such as are dictated by the soundest policy, and approved by the purest morality. That a parent, professing to be affectionate, shall not be unjust; that, professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that what purports to be an act of generosity, shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to restrain from doing that which would serve and promote the essential interests of society; [these] are rules

sent is lawful, as not restraining marriage generally. A condition prescribing due ceremonies, and place of marriage, is good, which only limits the time to the age of twenty-one, or any other reasonable age, provided it be not used evasively to restrain marriage generally. (a)

(a) *Scott v. Tyler*, Hargr. Jur. Arg. vol. 1, p. 22.

which cannot reasonably be reprobated, as harsh infringements of private liberty, or even reproached, as unnecessary restraints on its free exercise. On these considerations are founded those distinctions which have, from time to time, been recognized in our Courts of Equity, respecting testamentary conditions with reference to marriage.

"Godolphin, also, has very correctly laid down the general principle: 'All conditions against the liberty of marriage are unlawful. But, if the conditions are only such as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect to time, place, or person, then such conditions are not utterly to be rejected.' Still, this language is to be understood with proper limitations; that is to say, that the restraints upon marriage, in respect to time, place, or person, are reasonably asserted. For it is obvious that restraints, as to time, place, and person, may be so framed as to operate a virtual prohibition upon marriage, or, at least, upon its most important and valuable objects. As, for instance, a condition that a child should not marry until fifty years of age; or should not marry any person inhabiting in the same town, county, or state; or should not marry any person who was a clergyman, a physician, or a lawyer, or any person, except of a particular trade or employment; for these would be deemed a mere evasion or fraud upon the law.

"On the other hand, some provisions against improvident matches, especially during infancy, or until a certain age of discretion, cannot be deemed an unreasonable precaution for parents and other persons to affix to their bounty. Thus, a legacy given to a daughter to be paid her at twenty-one years of age, if she does not marry until that period, would be held good; for it postpones marriage only to a reasonable age of discretion. So, a condition, annexed to a gift or legacy, that the party should not marry without the consent of parents, or trustees, or other persons specified, is held good; for it does not impose an unreasonable restraint upon marriage; and it must be presumed that the person selected will act with good faith and sound discretion in giving or withholding their consent. The civil law, indeed, seems, on this point, to have adopted a very different doctrine; holding that the requirement of the consent of a third person, and especially of an interested person, is a mere fraud upon the law.

"Other cases have been stated, which are governed by the same principles. Thus, it has been said that a condition not to marry a widow, is no unlawful injunction; for it is not in general restraint of marriage. So, a condition that a widow shall not marry, is not unlawful, neither is an annuity during widowhood only. A condition to marry, or not to marry, Titius or Mævia, is good. So, a condition prescribing due ceremonies and a due place of marriage, is good. And so any other conditions of a similar nature, if not used evasively, as a covert purpose to restrain marriage generally.

"But Courts of Equity are not generally inclined to lend an indulgent consideration to conditions in restraint of marriage; and on that account, (being in no small degree influenced by the doctrines of the civil and canon law,) they have not only constantly manifested an anxious desire to guard against any abuse, to which the giving of one person any degree of control over another might eventually lead; but they have, on

66. A condition *restraining a widow from a second marriage*, generally is good.<sup>1</sup>

67. R. H. devised certain lands to his wife and her heirs ; but if she married again, then he devised those lands to his daughter in fee. The wife married again ; it was adjudged that the estate should go over to the daughter. (a) †

(b) *Fitchet v. Adams*, 2 Stra. 1128. *Jordan v. Holkham*, Amb. 209.

many occasions, resorted to subtleties and artificial distinctions, in order to escape from the positive directions of the party imposing such conditions." 1 Story, Eq. Jur. § 280—286.

<sup>1</sup> This doctrine, though it has usually been laid down without qualification, was strenuously combated and denied by the learned Mr. Justice Kennedy, sitting at *nisi prius*, in a case lately before him. It was conceded that, if an estate be *limited* to a widow, so long as she remains unmarried, the limitation is good ; but it was said that a *condition subsequent*, to the like effect, would be void. Thus, where a testator directed his executors to pay annually a certain sum out of the income of his real estate to his wife, for the support of herself and children, in monthly payments, and the residue to be expended in improving his farm, until his son should arrive at full age ; *provided* she remained his widow so long ; and in case she again married, the bequest to cease from the day of her marriage ; it was held that the restriction upon the wife's second marriage was void, and that she was still entitled to the annuity, until the majority of the son. *Middleton v. Rice*, S. J. C. *Pennsylvania*, 1 Pa. Law Journ. 229, N. S. In this case, the dictum of Lord Thurlow, in favor of such restraint upon widows, quoted by Mr. Justice Story in 1 Eq. Jur. § 285, was cited and disapproved. But the decision in this case was afterwards solemnly overruled, in *Commonwealth v. Stauffer*, 10 Barr. 350 ; in which, however, the learned Court went to the length of deciding that in a devise, a condition in *general* restraint of marriage, was good. It seems previously so to have been held, in principle, by the same Court, in *Bennett v. Robinson*, 10 Watts, 348. *Ideo quære*. [See also *McCullough's Appeal*, 12 Penn. State R. (2 Jones,) 197.]

Where a feme covert lived apart from her husband, and her father bequeathed to her an annuity, to cease if and while she should again live with her husband, this restriction was held void. *Wren v. Bradley*, 36 Leg. Obs. for May 6, 1848, p. 12, cor. Knight Bruce, V. C. And where an annuity was bequeathed to the mistress of the testator, by whom he had several children, but it was to be diminished one half in case she should marry, it was held that the clause of diminution, being an inducement not to marry, was void. *Webb v. Grace*, 10 Jur. 1049 ; *Grace v. Webb*, 15 Sim. 384, S. C.

[The law recognizes in the husband that species of interest in the widowhood of his wife, as makes it lawful for him to restrain a second marriage : that is, that the provision which he has made shall cease. I have no doubt also that, with respect either to his wife or a stranger, a testator may give an annuity to continue so long as she remains single or unmarried : but as to a person not a wife, if he first gives her a life or other estate, and then appends a condition to defeat that estate if she marries, that would not be good. *Kindersley, V. C.*, in *Lloyd v. Lloyd*, 10 Eng. Law & Eq. Rep. 143.]

[† For the law of legacies to which conditions are annexed in restraint of marriage, see 1 Roper on Legacies, 687, ed. 1828.]

## CHAP. II.

## PERFORMANCE AND BREACH OF CONDITIONS.

SECT. 1. <i>How a Condition is to be performed.</i>	SECT. 39. <i>Entry for a Condition broken.</i>
6. <i>Who may perform it.</i>	46. <i>Who may enter.</i>
10. <i>At what Time.</i>	50. <i>Grantees of Reversions.</i>
12. <i>At what Place.</i>	52. <i>Effect of such an Entry.</i>
15. <i>Who are bound to perform it.</i>	56. <i>Does not defeat Copyhold Grants.</i>
18. <i>Effect of its Performance.</i>	58. <i>Apportionment of Conditions.</i>
19. <i>What will excuse its Non-performance.</i>	60. <i>How a Condition may be destroyed.</i>
29. <i>Where Equity relieves against Conditions.</i>	64. <i>Distinction between a Condition and a Limitation.</i>
35. <i>Where it will not relieve.</i>	

SECTION 1. With respect to the *performance of a condition*, Lord Coke says, a diversity is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate. For a condition that is to *create an estate is to be performed* by construction of law *as near as it may be*, and according to its intent and meaning, albeit the letter and words of the condition cannot be performed. But otherwise it is of a condition that *destroys an estate*; for that is to be *taken strictly*, unless it be in certain special cases. (a) <sup>1</sup>

2. Where a literal performance of a condition becomes impossible by the happening of some subsequent event, it must then be performed as near the intent as possible.

3. Thus Littleton says, if a feoffment be made upon condition that the feoffee shall give the land to the feoffor and his wife, to hold to them and to the heirs of their two bodies engendered, and for default of such issue the remainder to the right heirs of

(a) 1 Inst. 219, b.

<sup>1</sup> [Merrifield v. Cobleigh, 4 Cush. 178; Ludlow v. N. Y. & H. R. R. Co. 12 Barb. Sup. Ct. 440.]



the feoffor. In this case, if the husband dies, living the wife, before any estate tail made unto them, then ought the feoffee to \* make an estate to the wife, as near to the intent of the \* 24 condition as may be; that is, to limit the land to the wife for life, without impeachment of waste, remainder to the heirs of the body of her husband on her begotten; remainder to the right heirs of the husband. (a)

4. Where there is a *condition precedent copulative*, the whole must be performed before the estate can arise.

5. Sir H. Wood, reciting the intended marriage of his daughter with the Duke of Southampton, limited his estate to the use of himself for life, remainder to the use of trustees and their heirs, to the intent that in case the Duke of Southampton should be married to his daughter, after the age of sixteen, and they should have issue male, then the trustees and their heirs should stand seised of the premises in trust for the duke, during his life. The marriage took place before the lady was sixteen; but she lived to that age, and died without issue. The question was, whether the duke was entitled to an estate for life. It was decreed that the duke was entitled to an estate for life under the settlement; but this decree was reversed in the House of Lords; and Lord Chief Baron Comyns says, the reversal was founded on this, that the words were plain and certain that there must not only be a marriage, but also issue male. And when a condition copulative, consisting of several branches, is made precedent to any use or trust, the entire condition must be performed, else the use or trust can never arise or take place. And it would be violence to break the condition into two parts, which was but one, according to the plain and natural sense of it. (b)

6. With respect to the persons *who may perform a condition*, it is a general rule that every one who has an interest in the condition, or in the lands to which it relates, may perform it. As if a feoffee, upon condition to pay at Michaelmas £20, enfeoffs another person before that time, the second feoffee may perform the condition. (c) <sup>1</sup>

(a) Lit. § 352.

(b) Wood v. Southampton, 2 Freem. 186. Show. Parl. Ca. 83. Harvey v. Aston, 2 Com. R. 732. (Vanhorne v. Dorrance, 2 Dall. 304, 317.)

(c) 1 Inst. 207, b. (Simonds v. Simonds, 3 Met. 558.)

<sup>1</sup> [Wilson v. Wilson, 38 Maine, (3 Heath,) 20.]

7. Where a *time is appointed* for the performance of a condition, *the right to perform it will descend* to the heir. Thus, if a feoffment be made upon condition to be void, if the feoffor pays a certain sum of money on a particular day; though the feoffor should die before the day of payment, yet his heir may perform the condition. (a)<sup>1</sup>

25\*    \*8. A person having two sons, B and C, devised lands to his wife for life, after her death to his son C and his heirs; provided that if B did, within three months after the death of his wife, pay to C, his executors or administrators, the sum of £500, then the said lands should go to B and his heirs. The wife lived several years; and during her life B died, leaving J. D. his heir; who not being heir at law to the testator, the question was, whether he could, after the death of the wife, perform the condition. And though it was objected that this being a condition precedent, and merely personal in B, who had neither *jus in re* nor *ad rem*, and could not, therefore, release or extinguish the condition; consequently, that his heir could not perform it after his death; yet it was held, and so decreed, that the possibility of performing this condition was an interest or right, or *scintilla juris*, which vested in B himself, and descended to his heir, who might perform it. (b)

9. But where the words of a condition are *general*, and *no time is specified* for the performance of it, such condition *must be performed by the party* to whom it is reserved, and not by his heir. Thus Littleton says, where a feoffment is made upon condition that if the feoffor pays a certain sum of money to the feoffee, then it shall be lawful for the feoffor and his heirs to enter; in this case, if the feoffor dies before the payment is made, his heir cannot perform the condition. (c)<sup>2</sup>

10. Where a *particular time is appointed* for the performance of a condition, it must be performed *at or before that time*. But

(a) Lit. § 234.

(b) Marks v. Marks, 1 Ab. Eq. 106.

(c) Lit. § 337.

<sup>1</sup> [The minority of the heirs of the grantee does not excuse them from performing the condition. Cross v. Carson, 8 Blackf. 138. See also Garrett v. Scouten, 3 Denio, 334.]

<sup>2</sup> Perhaps an exception to this rule may be admitted, where the money was a debt due from the feoffor to the feoffee, no time being limited for the payment,\* and the common-law period of reasonable time not having elapsed previous to the death of the feoffor.

where *no particular time* is appointed, the person to whom the condition is reserved must, in *some cases*, perform it within a reasonable and *convenient time*; <sup>1</sup> and, in *other cases*, he may perform it at any time *during his life*; <sup>2</sup> but, if he dies without performing it, the right is not transmitted to his heir.

11. Thus, if a feoffment be made upon condition, that if the feoffee does not pay, &c., it shall be lawful for the feoffor to reënter; the money ought to be paid to the feoffor in convenient time; for it is not reasonable that the feoffee shall have the benefit of the land, and not pay the money. But if the condition be, that if the feoffor pays, &c., he may reënter; the feoffor has time to pay it during his life, because the other has the profit of the land, and has no loss by the nonpayment: (a)

12. \*Where a *particular place* is appointed for the per- \*26  
formance of a condition, the party who is to perform must *come to that place*; for the person to whom the condition is to be performed is not obliged to accept of the performance elsewhere; he may, however, if he pleases, accept of the performance at another place, and such acceptance will be good. (b)

13. If *no particular place* be appointed for the performance of a condition, and the condition be that the feoffee shall pay a *sum of money*; in that case, the *feoffee must seek for the person* to whom the money is to be paid, if he be *within* the realm; if he is *out of* the realm, then it is *not* incumbent on the feoffee to seek him, nor is the condition broken. (c)

14. Where the condition is, to deliver twenty quarters of *wheat*, or twenty loads of *timber*, or such like, the feoffor is not bound to carry the same about, and seek the feoffee; but the *feoffor must*,

(a) 2 And. 73.

(b) 1 Roll. Ab. 444.

(c) Lit. § 340. 1 Inst. 210, b.

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<sup>1</sup> Where a speedy performance of the condition is necessary in order to give the feoffor the full benefit intended to be secured to him; or where the immediate enjoyment was obviously his motive in making the agreement, the other party shall not have during his life to perform it, but only a reasonable time. *Hamilton v. Elliot*, 5 S. & R. 375, 384; *Ross v. Tremain*, 2 Met. 495. Thus, where the condition was, that the grantee should build a new house on the land, and suffer the grantor and his wife to dwell in it during their lives, and in the mean time to reside in an old house then on the land; it was held that the condition was broken by his not performing within convenient time. *Ibid.* And see *Hayden v. Stoughton*, 5 Pick. 528, 534.

<sup>2</sup> *Finlay v. King*, 3 Pet. 346, 376.

before the day, go to the feoffee, and learn where he will appoint to receive it, and there it must be delivered. (a) <sup>1</sup>

15. Where an estate is given upon condition, the taking possession of the land to which the condition is annexed, binds to the performance of the condition, even though such performance should be attended with a loss.

(a) Lit. § 340. 1 Inst. 210, b. 2 Leon. 260.

<sup>1</sup> The law respecting the place of performance of a condition, where no place has been designated, is the same as in cases of contract; but since the time of Lord Coke, it has undergone some modifications, so that the rules, laid down by him in universal terms, must now be taken with considerable qualification. The place of performance is now regarded purely as a question of intention, which is to be collected from the nature and circumstances of the case. If the contract or condition be for the delivery of goods on demand, the debtor or feoffor being the manufacturer or grower of the goods, or dealer in them, his manufactory, farm, or place of trade is understood to be the place intended for the delivery, and a tender there will be good. But if the goods are portable, such as cattle, and the like, and the time be certain, but no designation of the place, in the absence of other circumstances from which the intent can be collected, the feoffee's or creditor's place of abode at the date of the deed or obligation, will be taken as the place of delivery.

"If the goods are *cumbrous*, and the place of delivery is not designated, nor to be inferred from collateral circumstances, the presumed intention is, that they were to be delivered at any place which the creditor might reasonably appoint; and, accordingly, it is the duty of the debtor to call upon the creditor, if he is within the State, and request him to appoint a place for the delivery of the goods. If the creditor refuses, or, which is the same in effect, names an unreasonable place, or avoids, in order to prevent the notice, the right of election is given to the debtor; whose duty it is to deliver the articles at a reasonable and convenient place, giving previous notice thereof to the creditor, if practicable. And if the creditor refuses to accept the goods when properly tendered, or is absent at the time, the property, nevertheless, passes to him, and the debtor is forever absolved from the obligation. 2 Kent, Comm. 507, 508, 509; Co. Lit. 210, b; Aldrich v. Albee, 1 Greenl. 120; Howard v. Miner, 2 Applet. R. 325; Chipman on Contracts, p. 51—56; Lamb v. Lathrop, 13 Wend. 95. Whether, if the creditor is out of the State, no place of delivery having been agreed upon, this circumstance gives to the debtor the right of appointing the place, *quære*; and see Bixby v. Whitney, 5 Greenl. 192; in which, however, the reporter's marginal note seems to state the doctrine a little broader than the decision requires, it not being necessary for the plaintiff, in that case, to aver any readiness to receive the goods, at any place, as the contract was for the payment of a sum of money, in specific articles, on or before a day certain.

"By the Roman law, where the house or shop of the creditor was designated or ascertained as the intended place of payment, and the creditor afterwards and before payment, changed his domicile or place of business to another town or place, less convenient to the debtor, the creditor was permitted to require payment at his new domicile or place, making compensation to the debtor for the increased expense and trouble thereby caused to him. But by the law of France, the debtor may in such case require the creditor to nominate another place, equally convenient to the

16. An estate being devised to Christ's Hospital, on condition of maintaining six children from a particular parish; the hospital having taken possession of the estate, the rents at first proved insufficient to maintain six children, so that the hospital had only maintained three; and an account having been exhibited to the governors, the latter had been satisfied. But, upon filing the information, it was found that there had been a mistake in the account, the rents not having been expended; and it appeared that they had become sufficient to maintain the whole number. Lord Thurlow said, that whether the rents were or were not sufficient to maintain the number, the hospital, having taken possession of the estate, was bound to perform the condition, and that they should have considered of that previous to taking possession. (a)

17. If an estate be made to a *married woman* upon condition, she will be *bound to perform it*, because this does not charge her person, but the land. So, if an estate be made to an infant, upon an express condition, the *infant will be bound to perform it*.

\* And if an estate be made to a person in fee, upon condition, his heir, in case of his death, though he be within age, shall be bound by the condition. (b) <sup>1</sup> \*27

18. When a condition is *performed*, it is thenceforth *entirely*

(a) Att. Gen. v. Christ's Hospital, 3 Bro. C. C. 165. Att. Gen. v. Andrew, 3 Ves. 633.

(b) 1 Roll. Ab. 421.

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debtor; and on his neglecting so to do, he may himself appoint one; according to the rule, that *nemo, ulterius facto, prægravari debet*. Poth. on Oblig. No. 238, 239, 513. Whether, in the case of articles not portable, but cumbrous, such removal of domicile may, at common law, be considered as a waiver of the place, at the election of the debtor, does not appear to have been expressly decided. See Howard v. Miner, 2 Applet. R. 325, 330." See 2 Greenl. on Evid. § 609—611, and cases there cited. See also 2 Kent, Comm. p. 505—509; Chipman on Contr. p. 24—26, 28—30, 49; Poth. Obl. No. 238, 239, 512, 513.

The tender must be made at or before the expiration of the *utmost convenient time* of the day; that is, while it is light enough to examine the goods; and ordinarily before sunset. 1 Inst. 202, 211; Plowd. 172, 173; 6 Bac. Abr. 453; 1 Shep. Touchst. 135, 136. In a late case, however, it *seems* to have been held, that where goods are to be delivered on a certain day, though the creditor is not bound to be at the place to receive them after sunset, yet, if he happens to be there, a tender to him, at any time before midnight, will be good. Startup v. McDonald, 2 M. & G. 395; further reported in 6 M. & G. 593. And see the Law Mag. for Feb. 1845, p. 171. The ultimate decision, however, was by only six of the sixteen Judges; five dissenting from the judgment, and five being absent. See, as to tender of money, tit. 15, ch. 4.

[<sup>1</sup> Cross v. Carson, 8 Blackf. 138; Garrett v. Scouten, 3 Ohio, 334.]

gone; and the thing to which it was annexed, becomes absolute and unconditional. We have seen, that this was the principle adopted by the Judges, in the construction of a gift to a man and the heirs of his body; and that the Statute *De Donis Conditionalibus* took away that construction, and declared that this kind of estate should descend to the heirs of the body only of the grantee; and that there remained a reversion in the grantor; not a right of entry for a condition broken. (a)

19. There are several *circumstances which will excuse* the non-performance of a condition. Thus, where the performance of it becomes impossible by the *act of God*, it will be excused.<sup>1</sup>

20. A person devised his estate to his eldest daughter, upon condition she would marry his nephew on or before she attained the age of twenty-one years. The nephew died young; and the daughter never refused, nor was ever required to marry him. Adjudged that the condition was not broken, having become impossible by the act of God. (b)

21. Where the performance of a condition becomes impossible

(a) Tit. 2, c. 1.

(b) *Thomas v. Howell*, 1 Salk. 170.

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<sup>1</sup> It must be impossible in the nature of things, so as not to admit of performance by any one; and not merely impossible to the party, under his particular circumstances at the time; unless his personal act, and not another's, is essential to the performance. If, for example, the life of the obligor is essential to the performance of the obligation, from its nature, so that it entered into the motives of both parties, constituting part of the subject-matter of the contract; as, if an eminent painter were bound to paint a picture; his death before the time limited would excuse the breach; for the obligation was upon the tacit inherent condition that he should live. But if otherwise, and the act could as well be done by another, it would be a breach, and his estate would be liable. A distinction was taken in *Paradine v. Jane*, Aleyn, 26, between the case where the duty or obligation was created by the law alone, and where it was created only by the act of the party; it being held that, in the former case, performance was excused by impossibility, and the latter, not, because he might have provided against it. This distinction has been followed in many subsequent cases; but its soundness has been of late much questioned. It was said by Dunning, *arg.* to have been considered in Chancery, and determined not to be law; 3 Burr. 1639; and it was so regarded by McKean, C. J., in *Pollard v. Shaffer*, 1 Dall. 210, 214. It was evidently deemed erroneous in principle, by Mr. Justice Story, though, as he remarked, having "the countenance of highly respectable authorities." Story on Bailm. § 36, and note (2), 2d ed.; 10 Am. Jurist, 250. Where the performance becomes legally impossible, by the compulsory operation of law, it is also excused. *Doe v. Rugeley*, Churchwardens, 6 Ad. & El. 107, N. S.; 8 Jur. 615.

[See also *United States v. Frémont*, 17 How. (U. S.) 560; *United States v. Reading*, 18 Ib. 1, as to what will excuse from the performance of conditions subsequent.]

by the act of God, if it is *precedent no estate will vest*; but if it be *subsequent*, the estate becomes absolute.<sup>1</sup> And where the performance of a condition (subsequent) becomes impossible by the act of the person who created it, the estate becomes also absolute. (a) <sup>2</sup>

22. Vincent Darley devised his estate, called Battins, to his sister, for life. He also gave her the rents and profits of all his chattel estates for so many years as she should live, and she should choose to reside at Battins. The testator afterwards revoked the devise of the estate of Battins; and it was resolved that the devisee was entitled to the benefit of the chattel estates, discharged from the condition of living at Battins; which the revocation had put out of her power. (b)

23. If a condition consists of *two parts*, of which *one was impossible* to be performed at the time when it was created, yet the other must be performed; and the performance of the part which is possible will be sufficient. (c)

24. But where a condition consists of *two parts, in the disjunctive*, \* and the party has *an election* which of them \* 28 to perform, both being possible at the time of creating the condition; but one of them becomes after impossible by the act of God, this will excuse the performance of that, and also of the other; for otherwise the election would be taken away by the act of God. It was, however said, in a subsequent case, that the rule and reason in Laughter's case ought not to be taken so largely as Lord Coke has reported, but according to the nature of the case. (d) <sup>3</sup>

(a) 1 Inst. 206, u. 218, a. Aislabie v. Rice, 3 Madd. 256. (Wells v. Smith, 2 Edw. Ch. R. 78.)

(b) Darley v. Langworthy, 3 Bro. Parl. Ca. 359. (c) Wigley v. Blackwall, Cro. Eliz. 780.

(d) Laughter's case, 5 Rep. 21. 1 Ld. Raym. 279. Da Costa v. Davis, 1 Bos. & Pul. 242.

<sup>1</sup> See, accordingly, Merrill v. Emery, 10 Pick. 507; People v. Manning, 8 Cowen, 299; Holland v. Bouldin, 4 Monr. 147; Vanhorne v. Dorrance, 2 Dall. 317; Taylor v. Bullen, 6 Cowen, 624; Finlay v. King, 3 Pet. 374.

<sup>2</sup> See accordingly, U. States v. Arredondo, 6 Pet. 691, 745; Whitney v. Spencer, 4 Cowen, 39.

<sup>3</sup> The general rule, laid down in Laughter's case, must be understood with reference to the distinction there taken; namely, where the condition is for the benefit of the *obligor*. In that case, it was covenanted, in marriage articles, that if the husband and wife should sell certain lands of hers, the husband should either purchase other lands, to her, of the same value, or, should leave her the same amount of money, by his will. They sold the land; but the wife died before any other act was done. And the hus-

25. A condition may also be excused by the *default of the person to whom* it is to be performed, viz: by *tender and refusal*.<sup>1</sup> It is also excused,—1. By his *absence* in those cases where his presence is necessary for the performance of it. 2. By his *obstructing* or *preventing* the performance of it.<sup>2</sup> 3. By his *neglecting to do the first act*, if it be incumbent on him to do it. (a)<sup>3</sup>

26. Thus, if a man be bound to build a house, &c., he will be excused, if the person to whom he is bound prevents him from building it, either by any act of his own, or by any act of a stranger, by his command. (b)

27. The condition of a bond was, that A and his wife should, in Easter term next after the date of the bond, levy a fine to B. Lord Hobart said, that in this case B was bound to sue out a writ of covenant, otherwise the condition was not broken. (c)

28. In an action for debt, for £500, the penalty for articles of agreement, the declaration stated the agreement to have been, that Shore, the defendant, was to purchase of the Duke of St. Albans, (the plaintiff,) a farm, at the price of £2594, which was to be paid at Lady-day then next, in the following manner:—The duke was to accept of a conveyance of certain estates of

(a) 1 Roll. Ab. 453.      (b) Bro. Ab. tit. Coven. pl. 31.      (c) Walrond v. Hill, Hut. 48.

band was held discharged of the covenant. It was doubtless on the ground of this distinction that the Court, in *Studholme v. Mandell*, 1 Ld. Raym. 279, held the decision in *Laughter's* case to be good law. But where the condition is for the benefit of the *obligee*, and the election of the obligor as to one part is lost by inevitable casualty, he must perform the other. Thus, where upon the demise of a mill, the lessee covenanted to leave the mill-stones in as good plight as he found them, or pay such damage as A and B should assess; but they did not assess any; it was held that it belonged to the lessee, at his peril, to procure the assessment of damage; in default of which his covenant was broken. *Studholme v. Mandell*, *supra*; and see 3 Com. Dig. 112, Condition, K 2.

<sup>1</sup> See tit. 15, ch. 4, § 81, note.

<sup>2</sup> [Jones v. Walker, 13 B. Mon. 163.]

<sup>3</sup> The party to whom the condition is to be performed may also *wave* the forfeiture; in which case the condition is saved. *Chalker v. Chalker*, 1 Conn. R. 79; *Enfield Co. v. Connecticut River Co.*, 7 Conn. R. 28, 45; *Willard v. Henry*, 2 N. Hamp. 120; *Bailey v. Homan*, 3 Bingh. N. C. 915. So, if he accept performance at a subsequent day. *Hogins v. Arnold*, 15 Pick. 259, 263; and see *Bond v. Cutler*, 10 Mass. 419; *Gage v. Gannett*, 11 Mass. 217; *Jackson v. Crysler*, 1 Johns. Cas. 125. But mere indulgence, or silent acquiescence, is no waiver. *Ibid.*; *Gray v. Blanchard*, 8 Pick. 292. [*Moorefield v. Cobleigh*, 4 Cush. 184. Acts inconsistent with the claim of forfeiture, are sufficient evidence of such waiver. *Andrews v. Senter*, 32 Maine, (2 Red.) 394; *Ludlow v. The N. Y. & H. R. R. Co.*, 12 Barb. Sup. Ct. 440.]



Shore, at the price of £1820, which he was to convey at the expense of the duke; and the duke to make a good title to Shore at Shore's expense; and, on executing the conveyance, the duke was to receive the rest of the purchase-money; all timber-trees, elms, and willows, which were then upon any of the estates, to be valued, and the prices thereof to be paid by the respective purchasers. It was also agreed, that in case the duke should not be enabled to make a good title to the estate before the 24th of March, the agreement should be void. The defendant Shore pleaded that the duke was not capable, ready, and willing to make a good title to the said farm; and further, that the said duke had cut down divers trees on the said \* farm, \* 29 which, by the agreement, were to be valued, whereby the duke disabled himself from performing his agreement; for which reason the defendant declined and refused to carry the articles into execution. Replication; issue on the first plea, and general demurrer on the second. Lord Loughborough said it was clear, that unless the plaintiff had done all that was incumbent on him to do, in order to create a performance by the defendant, (if he might use the expression,) he was not entitled to maintain the action. If he had not set forth a sufficient title, judgment must be against him, whatever the plea was; and if the plea was a good bar, the same consequence would follow. It had been argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent; and, therefore, a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of *Boone v. Eyre* was cited; but in that case, though the Court of King's Bench held the plea insufficient, yet they laid down a clear and well-founded distinction, that where a covenant went to the whole of the consideration, on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent; and each party must resort to his separate remedy, for this plain reason, because the damages might be unequal. Then the question was, whether the covenant of the plaintiff went to the whole consideration of that which was to be done by the defendant. The duke clearly covenanted to convey the estate to the defendant, in which all the timber growing on the estate was necessarily included. The

timber was not disjoined from the estate by a separate valuation; it was expressly agreed that all trees, &c., which then were upon any of the estates should be valued; but it was not to be permitted to a party contracting to convey land, which included the timber, by his own act to alter the nature of it between the time of entering into the contract and that of performing it. There might be cases where the timber growing on an estate was the chief inducement to a purchase of that estate; but it was not necessary to inquire whether it was the chief inducement to a purchase or not; for if it might be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate by cutting down any of it. This was not an action of covenant

30\* where one party had performed his part, but was \*brought for a penalty on the other party refusing to execute a contract; but to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally, to complete his part. The Court, was, therefore, of opinion, that the plea was a good bar to the action; and on this gave judgment for the defendant. (a)

29. The *Court of Chancery* has, in many cases, interposed to moderate the rigor of the common law, in respect to the breach of conditions; upon the principle that equity ought to *relieve against all forfeitures and penalties, wherever a compensation may be made*. It was, however, formerly held, that a court of equity could not relieve against a condition precedent; but that, in the case of a condition subsequent, it was otherwise. It is, however, now settled, that the substantial difference which governs the interference of courts of equity, in cases of conditions, is not whether the condition be precedent or subsequent, but whether a compensation can or cannot be made. (b) <sup>1</sup>

(a) *St. Albans v. Shore*, 1 Hen. Black. 270. *Boone v. Eyre*, 1 H. Black. 273, n. *Hard v. Wadham*, 1 East, 619.

(b) *Treat. Eq. B. 1, c. 6, § 4, 5.* *Hayward v. Angel*, 1 Vern. 222. (*City Bank v. Smith*, 3 G. & J. 265.

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<sup>1</sup> The doctrine on this subject is thus stated by Mr. Justice Story:—"The general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case, the true test, (generally, if not universally,) by which to ascertain whether relief can or cannot be had in Equity, is, to con-

30. A married woman, having a power to dispose of lands, devised them to her executors, to pay £500 out of them to her son ; provided that if the father gave not a sufficient release of

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sider whether compensation can be made or not. If it cannot be made, then Courts of Equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, Courts of Equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then Courts of Equity will retain the bill, and will direct an issue of *Quantum damnificatus* ; and, when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon the payment of such damages.

“The same doctrine has been applied by Courts of Equity to cases of leases, where a forfeiture of the estate, and an entry for the forfeiture, is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment ; for the right of entry is deemed to be intended to be a mere security for the payment of the rent. It has also been applied to cases where a specific performance of contracts is sought to be enforced, and yet the party has not punctually performed the contract on his own part, but has been in default. And, in cases of this sort, admitting of compensation, there is rarely any distinction allowed in Courts of Equity between conditions precedent and conditions subsequent ; for it has been truly said, that, although the distinction between conditions precedent and conditions subsequent is known and often mentioned in Courts of Equity, yet the prevailing, though not the universal distinction as to conditions there is between cases where compensation can be made, and cases where it cannot be made without any regard to the fact, whether they are conditions precedent or conditions subsequent.”

The learned author adds, in a note,—“There is some diversity in the cases upon the subject of conditions precedent and conditions subsequent, as acted upon in Chancery. Thus, for example, it was said in *Eopham v. Bampfild*, 1 Vern. 83, that there was a difference between conditions precedent and conditions subsequent ;—‘For precedent conditions must be literally performed ; and this Court (a Court of Equity) will never vest an estate, where, by reason of a condition precedent, it will not vest at law. But of conditions subsequent, which are to divest an estate, it is otherwise. Yet, of conditions subsequent, there is this difference to be observed ; for, against all conditions, subsequent, this Court (of Equity) cannot, nor ought, to relieve. When the Court can, in any case, compensate the party in damages, for the non-precise performance of the condition, there it is just and equitable to relieve.’ In the case of *Hayward v. Angell*, 1 Vern. R. 223, the Lord Keeper said,—‘In all cases, where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief.’ In *Cary v. Bertie*, 2 Vern. R. 339, Lord Holt, assisting the Lord Chancellor, said,—‘In cases of conditions subsequent, that are to defeat an estate, these are not favored in law ; and, if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited. And a Court of Equity may relieve to prevent the divesting of an estate ; but cannot relieve to give an estate, that never vested.’ The Lord Chancellor, in the same case, said,—‘As the condition was the performance of a collateral act, and did not lie in compensation, he did not see any thing that could be a just ground for relief in a Court of Equity.’ Id. p. 344 ; S. C. 1 Salk. 231. We shall presently see that in some cases of forfeiture for breach of covenant, Courts of Equity will not grant relief upon the principle, that compensation can be made. In *Wallis v. Crimes*, 1 Ch. Cas. 90, the Lord Keeper decided, that, wherever a condition precedent

certain goods to her executors, then the devise of the £500 should be void, and it should go to the executors. After the death of the testatrix, a release was tendered to the father, which he refused to execute. On a bill brought by the son against the executors and the father, the father answered that he was then ready to release, though for some reasons he had before refused; whereupon the Court decreed the payment of the £500; and said it was the standing rule that a forfeiture should not bind, where a thing might be done after, or a compensation made for it. (a)

31. A person devised lands to J. B., upon condition to pay £20,000 to his heir at law, *viz.*, £1000 *per annum* for the first sixteen years, and £2000 *per annum* after, till the whole should be paid. The heir entered for the non-payment of one of the sums of £1000. Decreed that J. B. should be relieved upon payment of the £1000, with interest; the Court declaring, that wherever it could give satisfaction or compensation for the breach of a condition, it would relieve. (b)

32. A person having three daughters, devised lands to his eldest daughter, upon condition that she would, within six months after the testator's death, pay certain sums to her two sisters; if she failed, then he devised the lands to his second daughter,  
31 \* on \* the like condition. The Court said, it would enlarge the time of payment, though the lands were devised over; and that in all cases which lay in compensation, the Court might dispense with the time, even in the case of a condition precedent. (c)

33. A person devised lands to his kinsman J. S., paying £1000 a-piece to his two daughters, who were his heirs at law. J. S. made default, and the daughters recovered the lands in eject-

(a) *Cage v. Russell*, 2 Vent. 352.

(b) *Grimstone v. Bruce*, 1 Salk. 156.

(c) *Woodman v. Blake*, 2 Vern. 222.

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was in the nature of a penalty, Equity ought to relieve. See also *Bland v. Middleton*, 2 Ch. Cas. 1." See 2 Story on Eq. Jur. § 1314, 1315. The entire subject of relief in Equity against penalties and forfeitures is fully treated by this learned author in his 34th chapter, from which the above passages are extracted. See also *City Bank v. Smith*, 3 Gill & Johns. 265; *Scott v. Tyler*, 2 Bro. C. C. 431, and the argument of Mr. Hargrave in that case, p. 450—465; *Livingston v. Tompkins*, 4 Johns. Ch. R. 415, 431; *Bacon v. Huntington*, 14 Conn. R. 92; *Wells v. Smith*, 2 Edw. 75; *Popham v. Bampfild*, 1 Vern. 83; *Walker v. Wheeler*, 2 Conn. R. 299.

ment. It was decreed that the heir of J. S. should be relieved on payment of the principal and interest, though in favor of a volunteer, and to the disherison of the heir. (a)

34. [A familiar instance of relief against the consequences of a breach of a condition, occurs where a lessee neglects to pay his rent at the time specified in his lease, and a right of reëntry to avoid the lease, accrues to the lessor. Courts both of law † and equity, ‡ have in such cases interfered in the tenant's behalf, upon his satisfying his landlord his rent, and any damage he may have sustained by the tenant's neglect.] (b)<sup>1</sup>

35. If there can be *no compensation in damages*, a Court of Equity *will not relieve*. <sup>2</sup>As where a person made a lease, with a condition of reëntry if the lessee aliened, or assigned it without license; the lessee assigned it without license; and the Court of Chancery held this was a forfeiture, against which it could not relieve, because it was unknown what should be the measure of the damages; for the Court never relieved, but in those cases where it could give some compensation, and where there was some rule to be the measure of such damages, to avoid being arbitrary. (c)<sup>3</sup>

36. [So also the Court of Chancery will not relieve against a forfeiture incurred by the tenant's neglecting to repair, § or to keep the premises insured, || or by making a way through the

(a) *Barnardiston v. Fane*, 2 Vern. 366.

(b) (*Bowser v. Colby*, 1 Hare, 109.)

(c) *Wafer v. Mocato*, 9 Mod. 112. *Hill v. Barclay*, 16 Ves. 402. And see *Northcote v. Duke*, 2 Eden, 319, and note. *Ambl. 511*. (*Elliott v. Turner*, 13 Sim. 477.)

<sup>1</sup> [*Atkins v. Chilson*, 11 Met. 112; *Sanborn v. Woodman*, 5 Cush. 36.]

<sup>2</sup> Though the nature of the case be such as to afford no rule for the assessment of damages by way of compensation, yet if the parties have themselves prospectively liquidated the damages, relief may be had. As to the distinction between liquidated damages and penalties, see 2 Greenl. Evid. § 257—259; 2 Story, Eq. Jur. § 1318; 2 Poth. Obl. by Evans, n. 12.

<sup>3</sup> Lord Eldon seemed to think that relief could be had only where the breach consisted in the non-payment of money. *Hill v. Barclay*, 18 Ves. 64.

† [*Phillips v. Doolittle*, 8 Mod. 345; *Smith v. Parks*, 10 Ib. 383; *Goodtitle v. Holdfast*, Str. 900; *Anon.* 1 Wils. 75; *Goodright v. Norright*, Sir W. Bl. 746; *Pure v. Sturdy*, Bull. N. P. 97. See also *Doe v. Roe*, 3 Taunt. 402.]

‡ [*Wadman v. Calcraft*, 10 Ves. 67; *Davis v. West*, 12 Ib. 475; *Hill v. Barclay*, 16 Ves. 405; *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 24.]

§ [*Hill v. Barclay*, *ubi supra*, 18 Ves. 56.]

|| [*Rolfe v. Harris*, 2 Price, 206, n; *Reynolds v. Pitt*, Ib. 212, n; *White v. Warner*, 2 Mer. 459; *Green v. Bridges*, 4 Sim. 96.]

demised premises, contrary to an expressed covenant; †  
 32\* or by adopting \* a course of husbandry prohibited by a  
 covenant in his lease, ‡ or by exercising a forbidden trade  
 on the premises demised.] §

37. Where there is *no ground* for the interference of a Court of Equity *to relieve* against a condition, and an estate is limited, defeasible upon the breach of a condition, the Court of Chancery will *decree a reconveyance*.

38. A proviso was inserted in a marriage settlement, that if the intended marriage took effect, and the intended wife should not, when she came of age, by fine or otherwise, join in charging an estate to which she was entitled with £2000, then the settlement was to be void. The marriage took effect; but the wife finding, when she came of age, that her own estate was of greater value than the jointure, she and her husband refused to join in charging it with £2000. Whereupon a bill was brought to have a conveyance, which was decreed; and an account of the rents and profits directed from the time of the refusal; but no costs on either side; for this was not a condition precedent, but subsequent, to the vesting of the estates in the defendant. (a)

39. Upon the breach of a condition, the feoffor or grantor, or his heir, becomes entitled to the estate to which such condition was annexed; and in the case of freehold estates, *the only mode* by which advantage can be taken of the breach of a condition *is by entry*,<sup>1</sup> or, if that should be impossible, then *by claim*; because

(a) *Hunt v. Hunt*, Gilb. R. 48. *Préc. in Cha.* 887.

† [*Descarlett v. Dennett*, 9 Mod. 22.]

‡ [*Lovat v. Lord Ranelagh*, *supra*.]

§ [*Macher v. Foundling Hospital*, 1 Ves. & Bea. 188.]

<sup>1</sup> If the condition is for the payment of rent, remedy may be had, in some of the United States, by ejectment, without entry. See *post*, tit. 28, ch. 1. And in some States, this remedy would seem to be applied for the breach of any condition. Walker's *Introd.* 297; *Sperry v. Pond*, 5 Ohio, R. 387. The service by the lessor upon the lessee, of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; so that he cannot afterwards (though judgment has not been rendered in the ejectment) sue for rent due, or covenants broken, after service of the declaration. *Jones v. Carter*, 15 M. & W. 718. In *Massachusetts*, Rev. St. ch. 101, § 1—4, and in *Maine*, Rev. St. ch. 145, § 3—7, where freehold estates are recovered by writ of entry upon disseisin, proof of a right of entry is to be received as sufficient proof of seisin in the demandant. But whether this provision will dispense with an actual entry for *breach of condition, quære*. [After the breach of a condition subsequent, an entry is necessary to avoid the estate and cause it to re-

the solemnity of a feoffment, with livery of seisin, can only be defeated by an act of equal notoriety. But an *entry by a stranger*, on behalf of the person entitled to enter, is good without any authority; provided it be assented to afterwards by the person entitled. (a)

40. In the case of advowsons, rents, commons, remainders, and reversions, where no entry can be made, there must be a claim; which must be made at the church or upon the land. (b)

41. In all cases where the crown is entitled to land upon the breach of a condition, an office countervails an entry. (c) <sup>1</sup>

42. Littleton has stated the following case, in which no entry is necessary:—Where land is granted to a man for term of five years, with a condition, that if he pays the grantor within the first two years forty marks, that then he shall have the fee, or otherwise but for five years; and livery of seisin is made by \*force of the grant. Now the grantee has a fee \*33 simple conditional; and if he does not pay the forty

(a) 1 Inst. 218, a. Fitchet v. Adams, 2 Stra. 1128.

(b) 1 Inst. 218, a.

(c) Poph. 53.

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vest in the grantor or in one who has succeeded to his rights. Tallman v. Snow, 35 Maine, (5 Red.) 342. The entry must be actual, and must be made purposely for the breach of the condition. Thus, where a person entitled to enter after a breach of condition went upon the land and demanded seisin and possession, but made no claim of entry for the breach of condition, the entry was held ineffective and insufficient to lay a foundation for a recovery in ejectment.\* Bowen v. Bowen, 18 Conn. 535. Where there are several breaches of the condition, an entry made solely under a declaration of the general purpose to revest the estate by reason of condition broken, and without suggesting any particular breach as the occasion and purpose of the entry, is good and effectual as to all the breaches of condition. But where a party making the entry superadds to it a declaration of the specific grounds of the alleged forfeiture and cause of entry, he is bound by his specification and restricted to the breach alleged as the occasion of his entry. An estate upon condition is not defeated, as a matter of course, upon breach of the condition. It is wholly at the election of the party to whom the estate reverts, whether he will avail himself of the breach as a cause of forfeiture. He may decline taking advantage of it, and if so, the estate is not defeated. Now if he may wholly waive the right to forfeiture by declining to enter for a breach, it would seem to follow, that if there are two or more causes of forfeiture, an entry particularly limited to one cause would be equivalent to declining to avail himself of his right of entry for other and distinct causes. Atkins v. Chilson, 9 Met. 62. And where there has been a breach of condition, so as to entitle the Commonwealth to recover possession, the Commonwealth can make no valid conveyance of the estate without first recovering possession thereof. Thompson v. Bright, 1 Cush. 420.] And see Chalker v. Chalker, 1 Conn. R. 79, 87—90.

<sup>1</sup> Plowd. 243; Bro. Abr. Condition, pl. 125; The People v. Brown, 4 Caines, 416, 426.

marks within the time, then the fee and the freehold shall be adjudged to be in the grantor, without entry or claim, because the grantor cannot immediately enter, for the grantee is still entitled to hold the lands for three years. And Lord Coke observes on this case, that “seeing by construction of law the freehold and inheritance passeth *maintenant* out of the lessor; by the like construction the freehold and inheritance, by the default of the lessee, shall be revested in the lessor without entry or claim.” (a)

43. Lord Coke has also stated two cases where no entry is necessary:—1. If a person grants a rent-charge out of his lands, upon condition; there, if the condition is broken, the rent will be extinct, because, the grantor, being in possession, need not make a claim upon his own land; therefore the law will adjudge the rent void, without any claim.<sup>1</sup> 2. If a man makes a feoffment in fee, upon condition that the feoffee shall pay £20 on a particular day, and before the day the feoffee lets the land to the feoffor for years, reserving rent, and afterwards fails of payment, the feoffor shall retain the land; for he could not enter, being himself in possession. (b)

44. There is, however, a *distinction between a condition* that requires an entry, *and a limitation* that determines the estate *ipso facto* without an entry; of which an account will be given hereafter. (c)

45. Where an *estate for years determines* by a condition, *no entry is necessary*. Thus if a person demises lands for years,

(a) Lit. § 350. 1 Inst. 218, a.

(b) Idem.

(c) *Infra*, § 64.

<sup>1</sup> So, wherever the grantor is already in actual possession, no formal entry is necessary. *Lincoln & Kennebec Bank v. Drummond*, 5 Mass. 321; *Hamilton v. Elliott*, 5 S. & R. 375. So, if the parties are jointly in actual possession. But in such cases there must be a claim of exclusive title for the breach of condition; and this must be by such acts or words as will with distinctness admonish the grantee that thenceforth the possession will be retained for condition broken, and that the breach is not waived. Complaints alone are not sufficient. *Willard v. Henry*, 2 N. Hamp. 120.

[Where the party that is entitled to enter, is in possession at the time of the breach, he is presumed to hold for the purpose of enforcing the forfeiture. *Andrews v. Senter*, 32 Maine, (2 Red.) 394. But where A conveys to B by deed an estate upon condition, and at the same time B mortgages the premises to A, who on the non-payment of the mortgage debt at maturity, enters for foreclosure, and while he is in possession under such entry, a breach of the condition in his deed to B occurs, such entry and possession, without further notice or act on the part of A, will not be sufficient to divest absolutely the estate of B for such breach of condition. *Stone v. Ellis*, 9 Cush. 95.]



upon condition that if the lessor pays to the lessee £10, his estate shall cease. There, if the lessor performs the condition, the estate of the lessee is immediately determined without any entry. (a)

46. It has been stated that the *benefit of a condition* can only be reserved to the *feoffor*, donor, or lessor, and their *heirs*.<sup>1</sup> And it is a rule of the common law that no one can take advantage of the breach of a condition expressed, but parties and privies in right and representation, as heirs, executors or administrators of natural persons, and the successors of bodies politic. So that neither privies nor assignees in law, as lords by escheat, nor privies in estate, as persons in remainder and reversion, could formerly enter for such a condition broken. (b)

\*47. It should, however, be observed, that in the case \*34 of conditions implied, or in law, privies and assignees in law may enter for a condition broken. Thus Lord Coke says, if a man makes a lease for life, there is a condition in law annexed to it, that if the lessee creates a greater estate, &c., then the lessor may enter. Of this and the like conditions in law, which give an entry to the lessor, not only the lessor himself and his heirs may take the benefit, but also his assignee, and the lord by escheat. (c)

48. None but the heir at common law can enter for a condition broken.<sup>2</sup> Thus, if a person seised of lands in right of his mother,

(a) Plowd. 142. Bro. Ab. Cond. 83. Vide tit. 8, c. 1.

(b) Lit. § 247. (*Infra*, § 50—51.)

(c) 1 Inst. 215, a.

<sup>1</sup> The heir may take advantage of the breach, by entry, though he be not expressly mentioned in the deed. *King's Chapel v. Pelham*, 9 Mass. 501; *Parker v. Nichols*, 7 Pick. 111. [A conveyance made by the grantor to a third person, either before or after breach of the conditions, will not carry with it a right to reënter for condition broken. But this rule does not extend to leases in fee, reserving rents, nor to leases for life or years. *Nicol v. N. Y. & E. R. R. Co.* 12 Barb. Sup. Ct. 460.]

<sup>2</sup> The meaning is, that none can enter but he on whom the inheritance descends by the law of the land, whether it be statute or common law.

Where a father conveyed land to his son, upon condition that the son should maintain him, and pay all his debts, &c., with a clause of reëntry; it was held that the neglect of the son to pay a debt of the grantor, due to another son, though not presented for payment until after the father's death, was a forfeiture of the estate, and entitled the other son to enter, and to recover his share of the land, in ejectment, as one of the heirs at law. *Jackson v. Topping*, 1 Wend. 388. So, where a farm was devised to the testator's son, on condition that his daughters should have the use of a room in the house, &c.; it was held, that the daughters might enter for breach of the

makes a feoffment in fee of them upon condition, and dies, and afterwards the condition is broken, the heir on the part of the father shall enter; for though the estate does not descend to him, yet the right of entry for the condition broken, which was created by the feoffment, and reserved for the feoffor and his heirs, descended on him. But when he has entered, the heir on the part of the mother may enter upon him. (a)

49. If a condition be annexed to an estate held in gavelkind, and is broken, the heir at common law must enter for the breach; but after such entry, all the younger sons shall enjoy the estate with him. (b)

50. Upon the dissolution of the monasteries by King Henry VIII. most of their estates were granted to private persons, who could not take advantage of the conditions contained in the leases which had been formerly made of them. This produced the *statute* 32 *Hen. VIII. c. 24*, reciting that divers persons had leased manors, &c., for life or lives, or years, by writing, containing certain conditions, covenants, and agreements; and reciting that, by the common law, no stranger to any condition or covenant could take advantage thereof, &c. *It is enacted*, "That all persons and bodies politic, their heirs, successors, and assigns which have, or shall have, any gift or grant of the king, of any lordships, manors, lands, &c., which did belong or appertain to any of the monasteries, &c., or which belonged to any other persons, &c., and also *all other persons*, being grantees or assignees to the king, or to any other person or persons, and the heirs, executors, successors, and *assigns of every of them*, shall and may have *the like advantage by entry* for non-payment of rent, for doing waste, or other forfeiture; and *the same remedy by action* only, for not performing other conditions, covenants, 35\* and agreements \* contained in the said leases, against the lessees and grantees, their executors, administrators, and assigns, as the lessors and grantors ought, should, or might have had at any time or times." <sup>1</sup>

(a) 1 And. 184. 2 And. 22.

(b) Rob. Gav. 119. Godb. 3.

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condition, and recover their shares of the land as heirs at law. *Hogboom v. Hall*, 24 Wend. 146.

<sup>1</sup> Where the directors of a private company made a lease, with a clause of reentry, and afterwards the company was incorporated, with a provision in the charter that all

51. Lord Coke states the following resolutions and judgments made upon this statute. 1. The statute is general, viz., that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions. 2. It extends to grants made by the successors of the king, though the king be only named in the act. 3. Where the statute speaks of lessees, the same does not extend to gifts in tail. 4. Where the statute speaks of grantees and assignees of the reversion, an assignee of part of the estate of the reversion<sup>1</sup> may take advantage of the condition. 5. A grantee of part of the reversion<sup>2</sup> shall not take advantage of the condition. 6. Where the lessor bargains and sells the reversion by deed indented and enrolled, the bargainee is not in the *per* by the bargainor, and yet he is an assignee within the statute. So if the lessor grant the reversion in fee to the use of A and his heirs, A is a sufficient assignee within the statute, because he comes in by the act and limitation of the party; albeit he is in the *post*, and the words of the statute are, "to or by;" and they are assignees to him, though they be not by him. But such as come in merely by act of law, as the lord by escheat, or the like, shall not take benefit by this statute. 7. Although the words of the statute are, for non-payment of rent, or for doing waste or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture, by force of a condition, but only of such conditions as either are incident to the reversion, as rent; or for the benefit of the estate, as for not doing waste, for keeping the houses in repair, or such like; and not for the payment of any sum in gross, or things of that nature. (a)

52. Where a person *enters for a condition broken*, the estate becomes void *ab initio*; the person who enters is again seised of his original estate, in the same manner as if he had never con-

(a) 1 Inst. 215, a. Hill v. Grange, Plowd. 167. See Twynam v. Pickard, 2 B. & Ald. 105.

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contracts previously entered into with the directors of the company should be as valid and effectual as if the company had then been incorporated, and the contracts made with the corporation; it was held that the corporation might support an ejectment upon the clause of reëtry. Doe v. Knebell, 2 M. & Rob. 66.

<sup>1</sup> *E. g.*, where the reversioner in fee grants the reversion for life, or for years.

<sup>2</sup> *E. g.*, where the reversioner of three acres grants the reversion of two of them. In such case the condition is destroyed, viz., the right of entry for non-payment of rent.

veyed it away.<sup>1</sup> And as the *entry of the feoffor* on the feoffee for a condition broken defeats the estate to which the condition was annexed, so it *defeats all rights and incidents* annexed to that estate, together with *all charges and incumbrances* created by the feoffee during his possession: for, upon the entry  
 36 \* of the \* feoffor, he becomes seised of an estate paramount to that which was subject to those charges. (a)

53. Thus if a person, having an estate on condition, grants a rent-charge out of the land, or acknowledges a statute or judgment, and afterwards the condition is broken, for the breach of which the feoffor enters, he shall avoid all those incumbrances. (b)

54. So if a man seised of a conditional estate marries, after which the condition is broken, and the grantor enters for the breach, he will avoid the wife's title to dower. (c)

55. Although, in general, a person who enters for a condition broken, becomes seised of his old estate, yet Lord Coke mentions some cases where this cannot be on account of the alterations which have happened in the mean time. (d)

56. An entry for a condition broken does not defeat copyhold grants: therefore, if a person makes a feoffment in fee of a manor, upon condition, and the feoffee grants estates by copy, if afterwards the condition be broken; and the feoffor enter for the breach, yet the grants by copy made by the feoffee, even after the breach of the condition, shall stand good; for the feoffee was *legitimus dominus pro tempore*. Besides, the copyholder does not claim his estate from the lord's grant, but from the custom. (e)

57. If, however, a lease be made of a manor for years only upon condition, and the condition, is broken, no copyhold grants made after the breach of the condition will bind the lessor; because the estate of the lessee became absolutely void by the breach of the condition without entry. (f)

(a) Lit. § 325. 1 Inst. 202, a.

(b) 1 Rep. 147, b.

(c) 1 Roll. Ab. 474.

(d) 1 Inst. 202, n.

(e) Co. Cop. § 34. 4 Rep. 24, a. Gilb. Ten. 200. Tit. 10, c. 2.

(f) Gilb. Ten. 201.

<sup>1</sup> If the condition has been performed in part, by the payment of money, and the grantor enters for breach of the residue, whatever was previously paid, he may retain; but he cannot demand further performance, after taking back the land. *Frost v. Frost*, 2 Fairf. 235.

58. A condition being entire, cannot in general be apportioned by the act of the parties; therefore a grantee of part of the reversion shall not take advantage of a condition. As if a lease be made of three acres of land, reserving a rent, upon condition; and the reversion of two acres of the land is granted away. The rent shall be apportioned by the act of the parties; but the condition is destroyed; for that is entire, and against common right. (a)

59. There are, however, two cases in which Lord Coke says a condition may be apportioned:—1. By act in law, as if a person seised of two acres, the one in fee, the other in Borough English, has issue two sons, and leases both acres for life or years upon condition, the lessor dies; in this case, by the descent, which \* is an act in law, the reversion and con- \* 37 dition are divided. 2. By act and wrong of the lessee, as if a lessee makes a feoffment of part of the lands, and the lessor enters for the forfeiture; there the condition shall be apportioned; for no one shall take advantage of his own wrong. (b)

60. A condition may be destroyed in several ways. Thus it has been stated, that where a condition cannot be apportioned, it is destroyed.

61. A condition may be destroyed by a release. Thus Lord Coke says, if feoffee upon condition make a lease for life, or a gift in tail, and the feoffor release the condition to the feoffee, he shall not enter on the lessee or donee, because he cannot regain his ancient estate. (c)

62. If the feoffee upon condition make a lease for life, the remainder in fee, and the feoffor release the condition to the lessee for life, it shall enure to him in remainder. (d)

63. Acceptance of rent after the breach of a condition will, in many cases, operate as a discharge of the condition. (e)

64. Lord Coke mentions a distinction between a condition that defeats an estate, but requires a reëtry; and a limitation which determines the estate *ipso facto*, without entry.<sup>1</sup> Of the first

(a) 1 Inst. 215, a.

(b) Idem.

(c) 1 Inst. 291, b. 297, b.

(d) Idem.

(e) Vide tit. 32, c. 5.

<sup>1</sup> A condition is something inserted for the benefit of the grantor; giving him the power, on default of performance, to destroy the estate, if he will, and revest the estate in himself or his heirs. As the law does not presume forfeitures, it requires some express act of the grantor, as evidence of his intent to reclaim the estate:—viz. an entry.

sort, it has been shown that a *stranger cannot take advantage*; but of *limitations* it is *otherwise*: as if a man makes a lease *quousque*, that is, until J. S. returns from Rome; the lessor grants over the reversion to a stranger; J. S. returns from Rome: the grantee of the reversion may take advantage of the return of J. S. and enter, because the estate was determined by an express limitation. (a)

65. It is the same where a man makes a lease to a woman *quandiu casta vixerit*; or where a man makes a lease for life to a widow *si tamdiu in purâ viduitate vixerit*. So if a man makes a lease for 100 years, if the lessee lives so long, the lessor grants over the reversion, and the lessee dies, the grantee of the reversion may enter. (b)

66. There are also several cases of wills, in which the estate is devised over on breach of the condition, which will be stated in a subsequent title. These, however, are not properly estates on condition, but conditional limitations. (c)

(a) 1 Inst. 214, b. Vin. Ab. Condition, (K) pl. 12, 13.

(b) Idem.

(c) Tit. 16, c. 2.

A *limitation* is conclusive of the time of continuance, and of the extent of the estate granted; and beyond which it is declared at its creation not to be intended to continue.

*Conditions* render the estate *voidable*, by entry.

*Limitations* render it *void*, without entry.

If, upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to go to a *third person*; this is a *limitation over*, and not a *condition*. For if a *condition*, an entry by the grantor would be necessary; and he might defeat the limitation by neglecting to enter.

A *limitation* is *imperative*, and is determined by the *rules of law*.

A *condition* not only depends on the option of the *grantor*, but is also controlled by *Equity*, if the grantor attempts to make an inequitable use of it.

The performance of a *condition* is excused by the act of God, or of the law, or of the party for whose benefit it was made.

A *limitation* determines the estate *absolutely*, whatever be its nature. See 1 Preston on Estates, p. 40—59; 2 Bl. Comm. 155, 156; 11 Am. Jur. 42—62; 4 Kent, Comm. 126—128.

## TITLE XIV.

ESTATE BY STATUTE MERCHANT, STATUTE STAPLE, AND ELEGIT.

## BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 10.

KENT'S COMMENTARIES. Vol. IV. Lect. 66.

OWEN FLINTOFF. On the Law of Real Property. Vol. II. Book I. ch. 3, sec. 6, art. 4, 5.

LOMAX'S DIGEST. Vol. I. tit. 12.

SECT. 1. <i>Estates held as a Security for Money.</i>	SECT. 49. <i>What may be extended.</i>
6. <i>Statute of Acton Burnell.</i>	52. <i>Terms for Years.</i>
7. <i>Statute Merchant.</i>	57. <i>Trust Estates.</i>
10. <i>Statute Staple.</i>	60. <i>What is not liable to an Extent.</i>
13. <i>Recognizance.</i>	65. <i>These Estates are only Chattels.</i>
14. <i>Judgment and Elegit.</i>	68. <i>Must be executed by Entry.</i>
20. <i>When Judgments bind Lands.</i>	74. <i>Remedies upon Eviction.</i>
23. <i>Must be docketed.</i>	81. <i>How long they may endure.</i>
29. <i>Execution upon a Statute or Recognizance.</i>	84. <i>How they are determined.</i>
34. <i>Execution upon a Judgment.</i>	94. <i>A Statute, &amp;c. will protect a Purchaser.</i>
41. <i>Priority of the Crown in Executions.</i>	

SECTION 1. I shall now proceed to explain the nature of those *estates* which are *held as a security* or *pledge for the repayment of money*; of which there are *two kinds*; one, where the *creditor acquires the estate* by some legal and *compulsory process*; and the other where the estate is *conveyed by the debtor* to the creditor, as a pledge for securing the repayment of the money borrowed. The *first kind* are called *estates by statute merchant, statute staple, and elegit*; and owe their existence to the following circumstances:—

2. Upon the introduction of the feudal law into England, the feudatory was not only prohibited from alienating his land, but also from charging it with the payment of his debts; because

that might tend to disable him from performing his military services. The goods and chattels therefore of the debtor, 39 \* and the \* annual profits of the lands, as they arose, were the only funds which the law allotted for the payment of his debts. And this was thought the more reasonable, because nothing more than a chattel being borrowed, the chattels only of the debtor ought to be liable to the debt. (a)

3. Although this law was well suited to the situation of a warlike nation, who cultivated their own lands, and lived on the produce; yet it was no way calculated for a trading people, where it is a material object to create an extensive credit; which can only be done by making every kind of property subject to the payment of debts. Therefore, when, about the reign of Henry III., the English began to acquire some little foreign trade, the inconveniences of this doctrine began to be felt.

4. The king's prerogative, indeed, formed an exception to this rule; for he might always have had execution of the real estate, goods, and chattels of his debtor; but still under this restriction inserted in Magna Charta, c. 8, that the lands of the debtor should not be extended, where the chattels were sufficient, and the debtor ready to answer the debt. (b)

5. In the case of a private person, lands were also liable to execution in an action of debt against the heir, upon an obligation made by his ancestor; although, in such a case, the creditor could not have had execution against the ancestor himself. The reason given for this by Lord Coke is, that as the common law had provided an action of debt against the heir, if the creditor could not have execution of the land, the action would have been useless; for the goods and chattels of the ancestor belonged to his executors. (c)

6. Thus stood the common law till the reign of Edward I., when great complaints having been made by foreign merchants respecting the difficulty of recovering their debts, which had occasioned several of them to withdraw themselves from the kingdom; the *statute of Acton Burnell, De Mercatoribus*; was made in the eleventh year of that prince; by which it was enacted, that the chattels and devisable burgages of the debtor might be sold for the payment of his debts.

7. In consequence of several complaints that the sheriffs mis-

(a) Wright's Ten. 169.

(b) Tit. 1, § 59.

(c) 3 Rep. 12, a.



interpreted this statute, and delayed the execution of it, King Edward, in the parliament held at Westminster two years after, caused it to be rehearsed before him; and as a further security \*to merchants, a new statute was made, by \*40 which it was enacted that every merchant, to whom money was due, should cause his debtor to come before the mayor of London, or some chief warden of a city, and one of the clerks that the king should thereto assign, who should acknowledge the debt, and the day of payment; that this acknowledgment should be enrolled by one of the clerks; the roll to be double, whereof one part should remain with the mayor, the other with the clerk; that one of the said clerks should write an obligation, to which the seal of the debtor should be put, together with the king's seal. If the debtor did not pay at the day limited, all his lands should be delivered to the merchant, to hold to him until such time as the debt was wholly levied; and the merchant should have such seisin in the lands and tenements delivered to him or his assigns, that he might maintain a writ of novel disseisin, if he was ousted. (a)

8. This species of security is called a *statute merchant*; it may be described to be a bond or *contract upon record*, publicly *acknowledged* before the proper officer, and *attested* by the *king's seal*. (b)

9. The addition of the *king's seal*, which was never required to any contract at common law, was made in order to authenticate, and *render the security of a higher nature* than any other then known. For by this the king, in the person of the mayor, attests the contract, and takes immediate cognizance of the debt. Consequently, *execution is to be awarded*, upon failure of payment on the day assigned, *without any mesne process* to summon the debtor; or the trouble or charge of bringing proofs to convict him. For judges require these, on common contracts, to satisfy themselves of the justice and legality of the plaintiff's demands, before they award any execution against the defendant. But to this contract the king himself is a witness. There is besides the acknowledgment and confession of the debtor, that he really owes so much; which is the best and strongest evidence of the fact; therefore immediate execution is granted.

10. Another species of security of a similar nature in many

(a) 13 Edw. 1, stat. 3, c. 1.

(b) 2 Saund. R. 69, c. 11.

respects to a statute merchant is a *statute staple*; to explain which it will be necessary to premise, that in the reign of Edward III. it was thought expedient to pass the statute of the staple 27 Edw. III. stat. 2, which confined the sale of all English commodities, that were to be exported, to certain towns 41 \* in England, \* called the *estaple* or *staple*, where foreigners might resort to purchase; and to declare that no Englishman should, under great penalties, export these commodities himself.

11. This statute directs a proceeding similar to that which was prescribed for obtaining a statute merchant. The mayor of the place is empowered to take recognizances of debts which any one makes before him, in the presence of the constables of the staple; for which purpose, in every staple, a seal was to be kept by the mayor, with which all obligations made upon such recognizances were to be sealed; and in consequence of this sealed obligation, execution might be obtained against the lands and tenements of the debtor, in the same manner as under a statute merchant: so that the creditor should have a permanent interest in the lands and tenements thus delivered to him; with a right, if ousted, to recover them by a writ of novel disseisin.

12. A *statute staple* is therefore a *bond of record, acknowledged before the mayor* of some trading town, and *attested by a public seal*. But although both the statute merchant and statute staple were originally intended for the benefit of merchants only; yet, as they were obtained without any great trouble or expense, they became generally adopted as a common mode of security.

13. The practice of obtaining statute staple of persons not concerned in trade became so universal that an act was made in 23 Hen. VIII. prohibiting any persons but merchants from taking them. But this act created a new kind of security, called a *recognizance* in the nature of a statute staple, which is a *bond acknowledged* before the Justices of the King's Bench or Common Pleas, the Mayor of the staple at Westminster, or the Recorder of London, and *enrolled*: upon which the same advantages may be had as upon a statute staple.

42 \* \* 14. By the *common law*, in all actions where *judgment for money alone* was obtained, *satisfaction* could only be had of the *goods and chattels* of the defendant, and the *growing profits* of his lands, but not the possession of them. This

was a natural consequence of the feudal principles, which prohibited the alienation, and of course the incumbering a feud with debts. When the restrictions on alienation were taken away, this consequence still continued ; no creditor could take possession of his debtor's land, but only levy the growing profits ; and if the debtor aliened the land, the creditor lost even that. (a)

15. To remedy this, it was enacted by the *statute Westm. 2*, 13 Edw. I. c. 18, that when a debt was recovered or acknowledged, or damages adjudged in the king's courts, the *plaintiff should have his election*, either to have a writ of *feri facias*, or else that the sheriff should deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough ; and also *one half of his lands*, until the debt was levied, upon a reasonable price or extent. (b)

16. In pursuance of this statute, a new writ of execution was framed, called a writ of *elegit*, from the words of the writ : for where a plaintiff prayed this writ, the entry on the rolls was—*Quod elegit sibi executionem fieri de omnibus catallis, et medietatem terræ*. And thus a *judgment* in an action of debt, obtained in any of the courts of record at Westminster, *becomes a lien* on freehold estates, as it enables the person for whom such judgment is given, to obtain one half of the debtor's lands and tene-ments.<sup>1</sup>

(a) Harbert's case, 3 Rep. 11.

(b) 2 Inst. 394 ; 2 Saund. R. 68, a. n.

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<sup>1</sup> In those United States where land is liable to an *elegit*, or to be sold on execution, the doctrine that the lands of the debtor are bound by the judgment, is recognized, though in many cases with modifications, either by express statutes, or by immemorial usage. See note, at the end of this title. See also 4 Kent, Comm. 434—438.

Regularly, a judgment binds only those lands of which the debtor was seised, either in law or equity, at the time of its rendition. And an actual possession, whether adverse or under a contract to purchase, is sufficient evidence of such seisin. *Jackson v. Town*, 4 Cowen, 599 ; *Jackson v. Parker*, 9 Cowen, 73. But it is no lien upon a mere equity, such, for example, as the interest of a *cestui, que trust*. *Jackson v. Chapin*, 5 Cowen, 485. In some States, however, judgments bind every interest which the debtor may have in the lands. *Carkhuff v. Anderson*, 3 Binn. 4 ; *Cahoon v. Hollenback*, 16 S. & R. 425. The judgment is a lien upon lands owned and possessed by the debtor, at the time of judgment, though holden adversely to him at the time of levy and sale ; *Jackson v. Tuttle*, 9 Cow. 233 ; 6 Wend. 213 ; but it is not a lien in *Pennsylvania*, on lands purchased by the debtor after judgment, and sold by him before execution. *Colhoun v. Snider*, 6 Binn. 135. See *post*, § 38, note.

[In *New York*, since the Revised Statutes, the common-law lien of a judgment does not attach at all upon the real estate of the debtor, until the judgment has been actually

## 17. A judgment will therefore take place of any conveyance

docketed. *Buchan v. Sumner*, 2 Barb. Ch. R. 165. Where the equities of parties are equal against the lien of a judgment, that which first accrued is entitled to preference, *Northrup v. Metcalf*, 11 Paige, 570. Where a debtor has only an instantaneous seisin, the lien of a judgment against him does not attach. *Tallman v. Farley*, 1 Barb. Sup. Ct. 280. A judgment is a lien upon mortgaged premises, subject to the amount due on the mortgage at the time when the judgment is docketed, and claims secured by the mortgage which do not accrue until afterwards, will be postponed to it. *Goodhue v. Berrien*, 2 Sandf. Ch. 630. But a judgment recovered for a debt secured by mortgage, is not a lien upon the mortgaged premises. *Greenwich Bank v. Loomis*, 2 Ib. 70. A became lessee of certain premises, and before the time of his taking possession arrived, he assigned the lease to B. Before he became lessee, judgments had been docketed against him. These judgments were held not to be liens upon the leasehold premises, as A was never in possession of them. *Crane v. O'Connor*, 4 Edw. Ch. 409.

The lien of a judgment does not attach in equity upon the mere legal title to land, when the equitable title is in another, and if the purchaser under the judgment has notice of the equitable title before his purchase and the actual payment of the money, he cannot protect himself as a *bonâ fide* purchaser. *Averill v. Loucks*, 6 Barb. Sup. Ct. 19; *Lounsbury v. Purdy*, 11 Ib. 490. A judgment is not a lien upon the interest of a person holding a contract for the purchase of land. But in equity any person acquiring the legal title, with notice of the contract, takes it subject to the equities affecting the land in the hands of the vendor. *Moyer v. Hinman*, 17 Ib. 137.

In *Pennsylvania*, an execution and levy raise no new lien separate from the judgment lien, and on the expiration of the lien of the judgment before the levy is completed, the lien of judgments subsisting at the time, will hold the land in preference to the execution and levy. *Jameson's Appeal*, 6 Barr, 280. A judgment for ground rent, creates no new lien, such lien arising from the ground rent deed and not from the judgment, and not being subject to the Statute of 1798 of that State respecting judgment liens. *Wells v. Gibson*, 7 Barr, 154.

In *Virginia*, a judgment is a lien upon the lands owned by the debtor at the date of the judgment in the hands of *bonâ fide* alienees for value, *Rodgers v. McCluer*, 4 Gratt. 81; but a prior deed of trust unrecorded is null and void as to a subsequent judgment lien; nor is such lien defeated by the discharge of the debtor in bankruptcy under the federal bankrupt act of 1841. *McCance v. Taylor*, 10 Gratt, 580.

A judgment in favor of the Commonwealth upon a recognizance to the Commonwealth, creates no lien upon the debtor's estate unless by express statute. *Commonwealth v. Adkins*, 8 B. Mon. 380. The lien of a judgment is confined to such property as is liable to levy on execution and sale. *Robertson v. Demoss*, 23 Miss. (1 Cushm.) 298.

In *Illinois*, a judgment against an administrator is not a lien upon the land left by the decedent. *Stone v. Wood*, 16 Ill. 177. *Scates, J.*, dissenting.

The lien of a judgment in the Circuit Court of the United States for the Eastern District of Pennsylvania, is coëxtensive with the District. *Lombard v. Bayard*, Wallace, Jr. 196. So a judgment of the Circuit Court of the United States for Indiana, is a lien on all the lands of the judgment defendant in that State. *Simpson v. Niles*, 1 Smith, 104. So in *Illinois*, *United States v. Duncan*, 12 Ill. 523. And so in *Arkansas*, *Byers v. Fowler*, 7 Eng. 218; *Trapnall v. Richardson*, 8 Eng. 543. In *Alabama*, judgments rendered in the Circuit Courts of the United States create a lien on the lands of the defendant within the State, coëxtensive with the lien of judgments rendered in

\* of the land which is made subsequent to it; though \*43 it is said that a judgment creditor has neither *jus in re*, nor *ad rem*; therefore if he releases all his right to the land, yet he may extend it afterwards. (a)

18. The statute says, *cum debitum fuerit recuperatum, vel in curiâ regis recognitum*. These last words gave rise to a *practice* which is now become general: when money is borrowed, the debtor not only executes a *bond* to the creditor, but also a *warrant of attorney*, addressed to one or more attorneys of some court at Westminster, authorizing him or them to *acknowledge a judgment* for the money; which enables the creditor to sue out a writ of *elegit* as effectually as if the judgment had been obtained in an adversary suit.

19. In a modern case, Lord Kenyon said he saw no difference between a judgment that was obtained in consequence of an action resisted, and a judgment that was signed under a warrant of attorney; since the latter was merely to shorten the process, and to lessen the expense of the proceedings. (b)

20. The whole term is considered in law, to many purposes, as but one day; therefore if a judgment be given or acknowledged, at any time during a term, it relates to the first day of that term, and is considered in law as having been given on that day. Now the first day of term is the *essoign day*, for the *quarto die post* is only a day of grace. (c)

21. In consequence of this doctrine, purchasers were frequently

(a) 2 P. Wms. 491.

(b) *Doe v. Carter*, tit. 13, c. 1, and see *Sansom v. Goode*, 2 Barn. & Ald. 568.

(c) *Hodges v. Templar*, 6 Mod. 191.

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the State Courts. *Pollard v. Cocke*, 19 Ala. 188. In *Indiana*, judgments entered on the same day, create equal liens in favor of each of the judgment creditors, without regard to priority of issue or levy of execution, and if the land be sold on execution, each creditor is entitled only to his *pro rata* share of the proceeds. *Rockhill v. Hanna*, 4 McLean, 555.

In *Ohio*, the lien covers the land with all its incidents and appurtenances as used and enjoyed at the time such lien attaches. *Morgan v. Mason*, 20 Ohio, 401. Leasehold estates in the lands and water-power situated on the canals and rivers and owned and leased by the State, are not subject to judgment liens. *Buckingham v. Reeve*, 19 Ohio, 399. A judgment in *Indiana* is not a lien upon land held by the judgment defendant under a title bond. *Cooper v. Cutshall*, 1 Smith (Ind.) 128; S. C. 1 Carter, 246. Nor is it a lien on an equitable estate. *Russell v. Houston*, 5 Ind. (Port.) 180. In *Iowa*, it cannot operate as a lien upon a preëmption right to land. It attaches only to the estate in fee, or by inheritance. Nor will it be a lien upon after-acquired estate until a levy is made. *Harrington v. Sharp*, 1 Iowa, 131; *Wood v. Mains*, Ib. 275.]

affected by judgments obtained after their conveyances had been executed. To remedy this, it was enacted by the fourteenth section of the Statute of Frauds, "That any judge or officer of any of his majesty's courts of Westminster that shall sign any judgments, shall, at the signing of the same, without fee, set down the day of the month and year of his so doing, upon the paper book, docket, or record, which he shall sign; which day of the month and year shall be also entered upon the margin of the roll of the record, where the said judgment shall be entered."

22. By the fifteenth section it is enacted, "That such judgments as against purchasers *bonâ fide*, for valuable consideration of lands, &c., to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed; and shall not relate to the first day of the term whereof  
44 \* \* they are entered, or the day of the return of the original, or filing the bail."

23. By the statute 4 & 5 Will. and Mary, c. 20, made perpetual by 7 & 8 Will. III. c. 36, § 3, it is enacted, that the clerk of the essoigns of the Court of Common Pleas, the clerk of the dockets of the Court of King's Bench, and the master of the office of pleas in the Court of Exchequer, shall make and put into an alphabetical docket, by the defendants' names, a particular of all judgments for debt, by confession, *non sum informatus*, or *nihil dicit*, entered in the said respective courts of Michaelmas and Hilary terms, before the last day of the ensuing terms; and of the judgments of Easter and Trinity terms, before the last day of Michaelmas term. And it is thereby further enacted, "That no judgment not docketed, and entered into the books as aforesaid, shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' effects." (a)

24. It is said by Sir J. Jekyll, that judgments cannot be docketed after the time mentioned in the act, viz., the last day of the subsequent term to that in which they are entered. That the practice of the clerks, docketing them after that time, was only an abuse for the sake of their fees, and ineffectual to the party. (b)

(a) 2 Cro. & Jer. 318.

(b) Forshall v. Coles, *infra*, § 27; Hodges v. Templar, 6 Mod. 191.

25. Where a *purchaser had notice* of a judgment not docketed, and did not pay the full value of the estate, the Court of Chancery held that a presumption was thereby raised of an agreement, on the part of the purchaser, to pay off the judgment.

26. A bill was brought to have satisfaction of a judgment against a purchaser of an equity of redemption, or to redeem incumbrances, &c. The defendant insisted on the statute 4 & 5 Will. & Mary, that no judgment shall affect a purchaser or mortgagee, unless docketed: the judgment was not docketed till 1721, though the purchase was made in 1718. The counsel for the plaintiff insisted that the defendant, the purchaser, had notice of this judgment, and an allowance for it, in the purchase; \* which raised an equity for the plaintiff against him. \*45 Lord Macclesfield said it was plain the defendant had notice of the judgment, and did not pay the value of the estate; that was a strong presumption of an agreement to pay off the judgment. And since the plaintiff could not proceed at law against the defendant, upon the judgment, for want of docketing in due time, he ought to be relieved in a court of equity. Decreed, that the defendant should pay to the plaintiff the money *bonâ fide* due upon the judgment. (a)

27. In a subsequent case, Sir Joseph Jekyll held, that notice of a judgment not docketed, would not affect a purchaser; the statute being express that no judgment, not docketed, should affect any lands or tenements. This doctrine is now altered; and it has been determined by Lord Eldon, in the following case, that a *purchaser is bound by notice of a judgment, though not docketed.* (b)

28. The bill stated that W. Davis, being seised in fee of lands, agreed to sell them to the defendant; that the abstract having been delivered, the defendant was satisfied with the title, except in respect of a judgment which was subsisting against Davis: that the defendant contended that, having notice of the judgment, the plaintiff's title was not such as a purchaser could safely take. The bill further stated, that the judgment was not docketed, and therefore was not, by law, any lien upon the estate; and that the defendant's having notice of the judgment did not afford any just reason why the estate should be liable to it. Lord Eldon said

(a) *Thomas v. Pledwell*, 7 Vin. Ab. 53.

(b) *Forshall v. Coles*, 7 Vin. Ab. 5; Sugd. Vend. Appendix, 19.

the opinion he had formed on this case, after much consideration, was, that notice of the judgment would bind the purchaser; *by analogy to the case of the register acts. (a)*

46 \* \* 29. Where the money borrowed on the security of a statute merchant, statute staple, or recognizance, is not paid, the cognizee or creditor is entitled to a *writ of execution*, by which the lands of the debtor are delivered to him upon a  
47 \* reasonable extent; \* that is, upon a reasonable valuation, to be made by a jury, upon a writ of *extendi facias*, with this difference, that upon a *statute merchant* the sheriff may deliver the lands *to the cognizee* immediately. But upon a *statute staple* or *recognizance*, the sheriff must first seize the lands into the *king's hands*; and then the cognizee must have a *liberate* to get them. So that, in this respect, a statute merchant is *preferable* to a statute staple or recognizance.

30. Even *lands purchased after the acknowledgment* of a statute or recognizance are *bound* by it; and execution may be had against the heir of the cognizor and the terre-tenants. And if the cognizee only takes part of the lands, it will be good; for he may dispense with the rigor of the law, if he pleases. *(b)*

31. If the *debtor sells* all or any part of his lands, *after* he has acknowledged a statute or recognizance, still the *cognizor may extend them*, by the words of the statute; for otherwise it would be in the power of the cognizor, by his alienation, to frustrate the security. *(c)*

32. Where the cognizor, after the acknowledgment of the statute, *conveys his lands to several persons*, the cognizee must then sue out *execution of all the lands*; for it would be unreasonable to load one of the purchasers only with the whole debt, when the burden ought to be actually distributed on all; therefore the person aggrieved may relieve himself. *(d)*

33. An *alien friend merchant may extend lands* upon a statute, which the king shall not have upon office, and for which the merchant shall have an assise, in case of ouster; for the main end and design of the statute merchant and statute staple was to promote and encourage trade, by providing a sure and speedy

(a) *Davis v. Strathmore*, 16 Ves. 419; 3 Sim. 285; Tit. 32, c. 29.

(b) *Winch. 83*; *Harbert's case*, 3 Rep. 11.

(c) 2 Roll. Ab. 472, pl. 3.

(d) 3 Rep. 12, b.



remedy for merchant strangers, as well as natives, to recover their debts. (a)

\*34. Where a debt secured by a *judgment* is unpaid, \*48 the creditor may sue out a *writ of elegit*, upon which the sheriff is to empanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same; also to inquire as to his lands and tenements, and upon such inquisition to set out and deliver a moiety of the lands to the plaintiff, by metes and bounds. (b)

35. If the sheriff delivers *more than a moiety* of the debtor's land, and this appears upon the return, the execution is *totally void*. For the sheriff has only a circumscribed authority, which he cannot exceed; so that what is extended beyond a moiety, being without authority, and there being no possibility of separating it from the rest, the whole is void, as if nothing had been extended. Carthew, in his report of this case, makes Lord Holt say, that the inquisition is not void, but voidable only by writ of error, or by an *audita querela*. (c)

36. Although no more than a moiety of the lands of a debtor can be taken by an *elegit*; yet if *two judgments* are obtained by the *same person*, he may *extend both moieties*, which will be good. But if A and B recover severally against C, and A sues out an *elegit*, and has a moiety of the lands delivered to him, and then B sues out an *elegit*, he can only have a moiety of the lands which remain, not the whole. (d)

37. It was formerly held by some, that upon an *elegit* the sheriff was obliged to deliver a moiety of each particular farm and tenement. But in a modern case the Court of King's Bench determined that the *return was good*, though *separate lands were extended*; provided it did not appear that they amounted in value to more than a moiety of the whole; for otherwise not only a moiety of every farm and tenement, but even a moiety of every close and field, must be delivered to the creditor. Nor could the writ be executed according to this idea, but by delivering an undivided moiety; which was entirely contrary to the meaning of the statute, for the moiety to be extended must be set out by metes and bounds. (e)

(a) Dyer, 2 b. pl. 8.

(b) *Ante*, § 15; 10 Vin. Ab. 590.

(c) Putten v. Penbeck, 1 Salk. 563; Carth. 453.

(d) Gilb. Ex. 56; Hard. 23. Huyt v. Cogan, Cro. Eliz. 482.

(e) Denn v. Abington, Doug. 473. Fenny v. Durrant, 1 Barn. & Ald. 40.

38. Lands *purchased after the obtaining of a judgment* may be taken upon a writ of *elegit*; and it is laid down in 1 Roll. 49 \* Ab. \* 892, pl. 14 and 16, that execution may be sued of any land which the debtor had by purchase after the judgment, *though he had aliened it before execution*. So that a judgment binds all lands whereof the debtor was seised at the time when the judgment was entered, or which he afterwards acquires; and no subsequent act of his, not even an alienation, for a valuable consideration, to a purchaser, without notice of the judgment, will avoid it. (a)<sup>1</sup>

39. It should, however, be observed, that any *alienation of the legal estate, prior to the acknowledgment of a judgment*, is good against it; even an *alienation in equity* will suffice. Thus Lord Cowper has said, that articles made for a valuable consideration, and the money paid, will in equity bind the estate, and prevail against any judgment creditor, mesne between the articles and the conveyance. (b)

40. No execution can be sued against the heir, upon a recognizance or judgment, during his minority. And where a year and a day have elapsed, from the entry of the judgment, the Court concludes, *prima facie*, that the judgment is satisfied; but will grant a writ of *scire facias* for the defendant to show cause why the judgment should not be revived. (c)

(a) *Brace v. Duch. of Marlborough*, 2 P. Wms. 492; 2 Inst. 396.

(b) *Finch v. Winchelsea*, 1 P. Wms. 277.

(c) 1 Inst. 290, a. 3 Bl. Comm. 421.

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<sup>1</sup> This position was examined and the cases in support of it reviewed with great learning and ability, by Yeates, J., in *Colhoun v. Snider*, 6 Binn. 135, 138—144, and the rule shown to be at least questionable, as English law; and in that case the contrary was held as the law of Pennsylvania. [See also *Lea v. Hopkins*, 7 Barr. 492; *Packer's Appeal*, 6 Ib. 277; *Moorehead v. McKinney*, 9 Ib. 265.] The only authority cited by Rolle, is the case of Sir John de Moleyns, 30 Ed. 3, 24, which by no means warrants the doctrine he lays down; the remark of Finch, J., being only to the effect that the creditor might have execution of the lands then owned by the debtor, though aliened afterwards; and also of his after-acquired lands; but without mentioning whether these last could be taken, after he had sold them. And the language of the Master of the Rolls, in 2 P. W. 492, cited by Mr. Cruise, is only this, that the land afterwards purchased may be extended on the judgment. [In *Georgia*, judgments bind all the property owned by the defendant from their date, as well that subsequently acquired, as that owned at the signing of the judgment. *Kollock v. Jackson*, 5 Geo. 153. And in a contest between attachments and ordinary suits it is the judgment and not the levy which determines the lien, and if the judgment by ordinary process be older than the attachment judgment, it takes precedence. *Litchton v. McDougald*, 5 Geo. 176. In *Arkansas*, a judgment is a lien on after-acquired lands. *Bank v. Watson*, 8 Eng. 74.]

41. Lord Coke says, the *king by his prerogative*, is to be *preferred* in payment of his duty or debt, before any subject, although the king's duty or debt be the later. And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached, until he paid the king's debt. But hereof grew some inconvenience, for to delay other persons of their suits, the king's debts were more slowly paid; for remedy thereof it was enacted by the statute 25 Edw. III. c. 19, that the other creditors may have their actions against the king's debtor, and proceed to judgment, but not to execution. (a)

42. Lord Chief Baron Gilbert says, if the king's debt be prior upon record, it binds the lands of the debtor, into whose hands soever they come, because it is in the nature of an original feudal charge on the land; and therefore must subject every one who claims under it. But if the land were aliened in the whole, or in part, before the debt contracted, such alienee, claiming prior to the charge, would not be subject to it. (b)

43. If the subject's debt be by statute or judgment, prior to \* the king's debt, and the king extends the land \* 50 first, the subject shall not, by any after extent, take them out of his hands. But if such judgment be extended, and the subject has the possession delivered to him by a *liberate*, he shall hold it discharged from the king's debt. If the king's debt comes before the possession by *liberate*, the king's extent shall be preferred; and the subject must wait till the king's debt is satisfied. (c)

44. The reason of the difference is, because the king's debt is in the nature of a feudal charge, which if it comes on the lands, before the property of them is altered, it seizes on them, as it might have done for the original service at first imposed. But if there had been a lawful alienation before such debt, there it is not the feud of the tenant; therefore such charge cannot affect it; so that if there be a precedent judgment or statute, and a *liberate* pursuant, before the king's extent comes down; there it cannot charge the lands, because the property is altered by the extent of the subject, which relates to the time when the judgment was given, or statute staple acknowledged; for the extent and *liberate* of the subject was only executing such judgment or

(a) 1 Inst. 181, b.

(b) Gilb. Ex. 19. Tit. 1, § 69.

(c) Idem.

statute on the land. The execution was relative to that judgment, which was prior to the king's charge: so there was a complete alteration of property, prior to the king's charge, and before the extent came down.

45. If the king's extent had come before the *liberate*, he had charged the lands whilst it was in the hands of his debtor, and then his charge would be satisfied, as if it had been in the first feudal donation; for nothing can hinder the king's charge, but what amounts to a precedent alienation; but so far as there is a precedent alienation, they are not the lands of his debtor; a *liberate* in pursuance of a preceding judgment amounting to an alienation of the land, before it becomes charged to the king. (a)

46. The *lien upon the lands by the subject's debt* came in by the *statute of Westminster 2*. Before that, a judgment did not bind the land. But the king's debt bound the land before that statute; and as that statute did not touch the prerogative, therefore the king has a power to levy upon the lands, notwithstanding the preceding lien by judgment: therefore the king may seize lands that are bound by a preceding judgment, whilst the lands are in the custody of the law, on the *elegit* or extent; 51 \* and before they are actually delivered out to the creditor, by the *liberate*, as a satisfaction for his debt. But when they were actually delivered out to the creditor by the *liberate*, they then no longer belonged to the debtor, since the king's writ had delivered them over, for satisfaction of a debt that was prior to the king's; for the creditor did not take them under the burden of the king's debt, because his lien was antecedent to the king's debt. And it were repugnant to construe him to take the land, *sub onere* of the king's debt, when he took in satisfaction of a debt precedent. (b)

47. By the *statute 33 Hen. VIII. c. 39, § 74*, it is enacted, that where any suit is commenced, or any process awarded for the king, for the recovery of any of his debts, the same suit and process shall be preferred before the suit of any person or persons. And that the king, his heirs, or successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons; *so always that*

(a) Gilb. Ex. 91, tit. 1, § 69.

(b) Gilb. Ex. 91, tit. 1, § 69. (*Ante*, § 15, 16.) Curson's case, 3 Leon. 239. 4 Id. 10.

the king's suit be taken and commenced, or process awarded for the said debt, at the king's suit, before judgment given for the said *other person* or persons.<sup>1</sup>

48. This statute is not confined in its operation to bond debts only, but extends to all debts and executions at the suit of the king. It is, however, held to be *restrictive on the old prerogative*; for the words, "So always that the king's suit," &c., make a condition precedent. Hence, therefore, a judgment and execution by *elegit*, before any suit or process commenced by the king, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. (a)

49. *All estates in fee simple in possession may be extended* on a statute or recognizance, or taken by writ of *elegit*, as also all *estates in reversion expectant on leases for lives or years*. And in case of an *elegit*, the plaintiff shall have a moiety of the reversion, and a moiety of the rent. Thus, it was resolved in 10 Jac., that if a person leases for years, rendering rent, the re-

(a) Cecil's case, 7 Rep. 19, b. Att. Gen. v. Andrew, Hard. 23.

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<sup>1</sup> The Constitution of the United States gives power to Congress to pass laws giving to the United States a preference and priority of payment of their debts in all cases of the *death, insolvency, or bankruptcy* of the debtor. This power Congress has exercised in various statutes; see LL. U. S. July 31, 1799, Bioren's ed. Vol. II. ch. 5, § 21; Aug. 4, 1790, Ibid. ch. 62, § 45; May 2, 1792, Ibid. ch. 128, § 18, in regard to revenue bonds; and March 3, 1797, Ibid. ch. 368, § 5, in regard to all public debtors, of every description, and by every mode of indebtedment. See also, Stat. March 2, 1799, Ibid. Vol. III. ch. 128, § 65. The priority here given is only a priority of payment; it creates no *lien* on the estate of the debtor; and therefore does not overreach any *bonâ fide* alienation made before the priority attached. And it applies only to cases where the debtor had become actually and notoriously insolvent, and being unable to pay his debts, had made a voluntary assignment, not of part, but of *all* his property, for the benefit of all his creditors; or, having absconded or absented himself, his property had been attached by process of law. A *bonâ fide* conveyance of a part of his property, to secure a fair creditor, is not affected by these statutes. *Fisher v. Blight*, 2 Cranch, 358; *U. States v. Hooe*, 3 Cranch, 73. It is the general assignment of all the debtor's property, either by his own act, or by act of law, and which is carried into execution by the assignees, which gives effect to this priority. And if the object was a general assignment, the omission of a small part, either fraudulently, to evade the statute, or unintentionally and by mistake, will not defeat the priority. *U. States v. Monroe*, 5 Mason, R. 572, 574; *U. States v. Hawkins*, 16 Mart. 317. See *ante*, tit. 1, § 63, note ('), where this subject is more particularly stated. See also 4 Kent, Comm. 242—248. [The priority of the United States does not affect or supersede a mortgage on land, nor a judgment perfected by the issue of an execution and levy upon real estate. *United States v. Duncan*, 12 Ill. 523.]

version may be extended upon an *elegit*, during the lease; and the tenant by *elegit* shall have a moiety of the rent. (a)

50. An *estate tail* may be extended, during the life of the tenant in tail. But if execution be sued out against the issue, \* upon a statute or judgment acknowledged by the ancestor, the issue may avoid it by assise, or writ of *audita querela*; because a tenant in tail can only charge his estate during his life. (b)

51. A *rent-charge* may be extended on an *elegit*; for the land being made subject to the execution, includes every thing issuing out of it. And in this case the party may distrain and avow, though the tenant never attorned; for the law, creating his estate, gives him all means necessary for the enjoyment of it. (c)

52. The sheriff may, upon a writ of *elegit*, either extend a term for years, that is, deliver a moiety thereof to the cognizee, or sell the whole term, as a part of the personal estate, to the plaintiff, at a gross sum, appraised and settled by a jury. (d)

53. If the defendant tenders the money at the time of the appraisement, and before the delivery of the term, or even after, in court, the term is saved. And if it be delivered after, the defendant is entitled to a writ of *audita querela*. If no such tender be made, the property is altered by the delivery of the sheriff, and the plaintiff may either keep or dispose of it, without being accountable for the profits. If the term be extended at an annual, and not a gross value, the plaintiff is accountable for the profits. And if he receives the debt out of the term, before it expires, the defendant shall be restored to the term itself. (e)

54. Lord Hardwicke has said, that where an execution by *elegit* or *fieri facias* is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown; and a leasehold estate is also affected from that time. If the debtor, subsequent to this, makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment, to come at the leasehold estate, by setting aside the assignment; but may proceed at law to sell the term; and the vendee, who is generally a

(a) Campbell's case, 1 Roll. Ab. 894.

(b) Ashburnham v. St. John, Cro. Jac. 85. Tit. 2, c. 2, § 33.

(c) Moo. 32, No. 104.

(d) 2 Inst. 395. 8 Rep. 171, a.

(e) Gilb. Ex. 34. 2 Saund. R. 68, f.

friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment. (a)

55. It is enacted, by the 16th section of the Statute of Frauds, "That no writ of *fiery facias*, or other writ of execution, shall bind the property of the goods of the person against whom \*such writ of execution is sued forth, but from the time \*53 that such writ shall be delivered to the sheriff, &c., to be executed. And for the better manifestation of the said time, the sheriff, &c., shall, upon the receipt of any such writ, indorse upon the back thereof the day of the month and year, whereon he or they received the same."

56. In consequence of this statute, it has been *generally* held that if a *term for years* be assigned to a *bond fide* purchaser, before execution is actually sued out, and delivered to the sheriff, it cannot afterwards be taken by a creditor. But this doctrine has been *doubted* by the late Mr. Sergeant Hill, who appears to have been of opinion that the reasoning deduced from the case of an execution by *fiery facias*, did not apply to a writ of *elegit*; and that the Statute of Frauds had not altered the law, with respect to an *elegit*. (b)

57. It has been already stated that by the Statute of Frauds, *trust estates of freehold may be taken* in execution on an *elegit* for the debts of the *cestui que trust*; but that if a trustee has conveyed the lands, by the direction of the *cestui que trust*, before execution sued, though he was seised in trust for the debtor, at the time of the judgment, the lands cannot be taken in execution; for the words of the statute are,—“at the time of the said execution sued,” which refer to the seisin of the trustee. (c)

58. This doctrine appears to have been settled in the following case:—

H. Chamberlain being *cestui que trust* in fee of lands, J. Boardman, the lessor of the plaintiff, recovered a judgment against him for £160. Chamberlain borrowed £600 of the defendant Coles; and for securing that sum, the trustee of the legal estate, by the direction of Chamberlain, mortgaged the premises to Coles for 500 years. Boardman took out execution by writ of *elegit*; the

(a) *Burdon v. Kennedy*, 3 Atk. 739. *Jeanes v. Wilkins*, 1 Ves. 195. *Forth v. Duke of Norfolk*, 4 Mad. 503.

(b) *Rigge on Register*. Sugd. Vend. c. 16, § 4, div. 2.

(c) Tit. 12, c. 2.

sheriff, after an inquisition, by which it was found that Chamberlain was seised in fee, extended one moiety, and delivered it to the lessor of the plaintiff. The doubt was, whether he had any title by the Statute of Frauds; after argument by Comyns and Sir C. Phipps, it was determined by Mr. Justice Tracey, that the execution was not good; for the words, “at the time of the said execution sued,” refer to the seisin of the trustee. Therefore, if

the trustee had conveyed the land, before the execution  
54 \* sued, though he was seised in trust for \* the defendant, at the time of the judgment, the lands could not be taken in execution. Sir Edward Northey said, that since the act, such construction had been thought agreeable to the statute; though he did not know that it ever had been judicially determined. A case was mentioned by Mr. Justice Tracey, from Sergeant Cheshire’s notes, where this opinion seemed to be allowed by Lord Trevor, and not contradicted by the Court. (a)

59. It is also observable that Lord Chief Baron Comyns, who argued and reported this case, states the law accordingly in his Digest; where, after mentioning several things not liable to execution, he says, “Nor since the statute 29 Cha. II. c. 3, lands which the trustee has aliened before execution; for they are not bound by the judgment.” (b)

60. There are several kinds of real property which are not liable to an extent under a statute, recognizance, or judgment. Thus an *advowson in gross* cannot be extended on an *elegit* for reasons which will be given in a subsequent title. (c)

61. A writ of *elegit* does not lie of the *glebe belonging to a parsonage*, or vicarage, or of the *churchyard*; for each of these are *solum Deo consecratum*. (d)

62. An estate in *joint tenancy* cannot be extended after the death of the joint tenant, who acknowledged the judgment; but an estate in coparcenary or in common may be extended. (e)

63. It has been held in a modern case, that a *mere equitable interest* in a term for years, cannot be extended, nor is an *equity of redemption* extendible. (f)

64. If a *trustee* acknowledges a judgment or statute, though at

(a) Hunt v. Coles, Com. R. 226. See Doe v. Greenhill, 4 Bar. & Ald. 684.

(b) Com. Dig. tit. Execution, c. 14.

(c) Tit. 21.

(d) Jenk. 207.

(e) Tit. 18, c. 1. Tit. 19 & 20.

(f) Scott v. Scholey, 8 East, 467. Tit. 15, c. 2.



law, these are liens upon the estate; yet, *in equity*, they *will not affect it*, because a judgment is only a general security, not a specific lien on the estate. (a)

65. Upon the entry of the cognizee into the lands extended, he is called tenant by statute merchant, statute staple, or *elegit*; and although *the estates* thus acquired are uncertain, as to their duration, being determinable only on payment of the debt, and that persons holding such estates shall have the same remedy, by assise, as freeholders, yet they *are but chattels* which \* 55 vest in executors or administrators. (b)

66. Persons holding estates of this kind are *punishable for waste* by writ of waste,† or by an action of account; in which case the debtor shall have a *venire facias ad computandum* for the waste, and recover damages for the surplus. (c)

67. It was formerly held that these estates, like terms for years, might be barred by a recovery, suffered by the persons who had the freehold; but they are protected by the statute 27 Hen. VIII. c. 15, from the effects of a recovery of the freehold. (d)

68. The estates acquired by the execution of a statute recognizance, or *elegit*, must be *executed by an actual entry of the cognizee*; for till entry he has but a bare right, which is not assignable; so that although he should release all his right to the land, yet he may extend it after.<sup>1</sup> All he acquires is a lien on the land; but it is not certain whether he will ever make use of it; for he may recover the debt out of the goods of the cognizor by a *scire facias*, or take his body; and then, during the debtor's life, he can have no execution.

69. Upon the death of the cognizee of a statute, his administrator sued out an extent; and the *liberate* being returned, he assigned over the lands without making an actual entry; the question was, whether the assignment was good or not. It was determined that the assignment was void; for by the return of the *liberate* he had accepted of the possession, and was estopped to say the contrary. Then, when the owner still continued in possession, it turned the possession which the administrator had

(a) 1 P. Wms. 278.

(c) Fitz. N. B. 58 H.

(b) 1 Inst. 42, a. 2 Inst. 396.

(d) Tit. 36.

[† Abolished after the 31st day of December, 1834, by Stat. 3 & 4 Will. 4, c. 27, § 36.

<sup>1</sup> See note at the end of this title.

accepted by the *liberate* to a mere right, which was not assignable. Nor was it like an *interesse termini*, which the lessee might assign over before entry; because in that case the lessor is the principal agent, and has done every thing on his part to transfer an interest to the lessee, which he may execute at pleasure. (a)

70. The *sheriff* does not now, as formerly, on a writ of *elegit*, deliver actual, but *only legal possession* of a moiety of the lands. In order to obtain possession, the plaintiff must enter; or, if prevented from taking possession by entry, he must proceed by ejectment; in which he is obliged not only to prove the judgment, \*and by the judgment roll, that an *elegit* issued, and was returned; but must also prove the writ of *elegit* by a copy thereof, as well as the inquisition that was taken thereon. (b)

71. Where a plaintiff in ejectment claims under an *elegit*, and there is a person in possession, under a lease made prior to the judgment, upon which the *elegit* was sued out, he cannot recover.

72. In ejectment the plaintiff claimed under an *elegit* against one Wharton: an objection was taken at the trial by the defendants, that the tenant in possession enjoyed under a lease granted to him by Wharton, prior to the date of the plaintiff's judgment; therefore that the plaintiff could not succeed in this ejectment. To this it was answered, on the part of the lessor of the plaintiff, that he had given the tenant notice he did not mean to disturb his possession, his object being only to get into the receipt of the rents and profits of the estate; and that the defendants ought, therefore, not to be permitted to set up this objection. Mr. Justice Lawrence, before whom the cause was tried, was of opinion that the party who had the legal estate, must prevail in an ejectment; and that, as the tenant's title accrued prior to that of the lessor of the plaintiff, the latter could not succeed in this ejectment. The Court of King's Bench was of the same opinion. (c)

73. It has, however, been already stated, that where there are subsisting leases made prior to the signing of a judgment, the cognizee may extend a moiety of the reversion, and of the rent, upon his *elegit*; and after such extent he may, by the usual pro-

(a) Hannam v. Woodford, 4 Mod. 48. Tit. 8, c. 1.

(b) Saund. R. 69, c. n. 3.

(c) Doe v. Wharton, 8 T. R. 2. Tit. 12, c. 3.

cess of ejectment, have all such remedies to recover a moiety of the rent, as the cognizor himself might have had for the whole before the extent, or will have after it for the other moiety. (a)

74. The statute 13 Edw. I. gave to tenants by statute merchant a writ of novel disseisin,† in case their possession was disturbed; but if the eviction was upon good title, the cognizee had no further remedy.

75. The statute of the staple also gives the creditor, if ousted of the lands taken in execution, a means of recovering them by writ of novel disseisin; and by the statute 23 Hen. VIII. c. 6, § 9, persons having execution of lands by reason of a recognizance, in the nature of a statute staple, their executors, administrators, \* or assigns, where they are disseised, shall have \* 57 like remedy as persons having execution on a statute staple.

76. The statute of Westm. 2, c. 18, gives the tenant by *elegit* a writ of novel disseisin, if ejected; and after a writ of re-disseisin if need be. Lord Coke observes, that his executors and administrators shall have the same remedy, by the equity of the act, as also the executors and administrators of tenants by statute merchant and statute staple. (b)

77. By the *common law*, after a full and perfect execution had, by extent returned, and entered on record, the cognizee could have *no new extent* on the effects of the cognizor; because there was once satisfaction given to the creditor, on record, though the lands had been recovered from him before he had levied his debt. (c)

78. This doctrine was *altered by the statute* 32 Hen. VIII. c. 5, by which it is enacted, That if after any lands be delivered in execution on just cause, they shall be recovered, divested, taken, or evicted out of or from the possession of any such person, &c., before such times as the said tenants by execution, their executors or assigns, shall have fully levied their debt and damages, for which the said lands, &c., were taken in execution; then every such recoveror, obligee, and cognizee, shall have a *scire facias* out of the same Court from whence the former execution pro-

(a) Campbell's case, *ante*, § 49.

(b) 2 Inst. 397.

(c) 1 Inst. 290, a.

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† [Abolished by Stat. 3 & 4 Will. 4, c. 27, § 36, 37, 38.]

ceeded, against the person or persons on whom the former execution was pursued, their heirs, executors, or assigns, to have *execution of other lands, &c.*, liable and to be taken in execution, *for the residue* of the debt and damages.

79. Lord Coke has laid down the following rules for the construction of this statute.

First. Where the tenant by execution has a remedy given him by law, after eviction, there the statute extends not; for the act says, by reason whereof the said recoverors, obligees, and cognizees, have been clearly set without remedy, &c. For the body refers to the preamble; and the party ought not to have double satisfaction, one by the former laws, and another by this statute. Therefore, if part of the land be evicted from the tenant by execution, this statute does not extend to it; because he shall hold the residue till he is fully satisfied; if all be evicted, saving one acre, he must be contented to hold that; for he can have no new execution upon this statute. (a)

58 \* 80. Secondly. If a man be bound to A in a statute of £1000, and by a later statute to B in £100, B first extends, then A extends, and takes the lands from B, yet B shall have no aid of the statute; because, after the extent of A, B shall reënjoy the land by force of his former execution.

Thirdly. If the wife of the cognizor recover dower against the tenant by execution, he shall hold over, and shall have no aid of this statute.

Fourthly. If a man puts out his lessee for years, or disseises his lessee for life; after, acknowledges a statute, on which execution is sued against him; and the lessees reënter; the tenant by execution, after the leases ended, shall hold over, and have no aid of this statute.

Fifthly. This statute must not be taken literally, but according to the meaning. Therefore, where the letter is, until he, &c. or his assigns shall fully and wholly have levied the whole debt or damages; if he hath assigned several parcels to several assignees, yet all these shall have the land, but till the whole debt be paid.

Sixthly. Where the words are, "for the which the said lands," &c., were delivered in execution; a disseisor conveys lands to the king, who grants the same over to A and his heirs, to hold by fealty and £20 rent, and after grants the seigniority to B;

(a) 1 Inst. 289, b. 11 Vin. Ab. 32.

B acknowledges a statute, and execution is sued of the seigniory. A dies without heir; the cognizee enters, and is evicted by the disseisee. He shall have the aid of this statute, yet it is out of the letter of the law; for the seigniory was delivered in execution, and not the tenancy. But he was tenant by execution of those lands, therefore within the statute.

Seventhly. Where the words are, "delivered and taken in execution," yet if after the *liberate* the cognizee enter, as he may, so as the land is never delivered, yet he is within the remedy of this statute; for he is tenant by execution.

Eighthly. Where the statute says, "Then every such recoveror, obligee, and cognizee, shall," &c., and says not, their executors, administrators, or assigns, but they are omitted in this material place; yet, by a benign interpretation, the statute shall extend \*to them, because they are mentioned in the next \*59 precedent clause of the eviction; and the remedy must by construction, be extended to all the persons that appear by the act to be grieved.

Ninthly. When the statute gives a *scire facias* out of the same court, &c., if the record be removed by writ of error into another court, and there affirmed, the tenant by execution, that is evicted, shall have a *scire facias*, by the equity of this statute, out of that court; because the *scire facias* must be grounded upon the record.

Tenthly. Where the statute gives the *scire facias* against such person or persons, &c., that were parties to the first execution, their heirs, executors, or assigns, &c., this must not be taken so generally as the letter is. For if the first execution was had against a purchaser, &c., so as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no *scire facias* shall be awarded against him, his heirs, executors or assigns. If he had other lands subject to the execution, then a *scire facias* lies against him or his assignees, not against his executors. Neither in that case can he have a *scire facias* upon this statute against the first debtor or cognizor, because it gives it only against him, &c., that was party to the first execution, his heirs, executors, or assigns. But if there be several assignees of several parcels of land, subject to the execution, one *scire facias* upon the statute shall lie against all of them.

81. As to the *duration* of these estates, the law allows the creditor to hold them *until he has received all his debt*. In the case of a *statute*, the creditor is *also entitled to costs*; and as the sheriff is directed to make a reasonable extent of the land, it follows that upon a computation of the debt, and the value of the lands, it may be easily known how long the extent may continue, and at what time the debtor will be entitled to have his land again.

82. In the case of any disseisin or *interruption by a stranger*, the *cognizee shall not hold over* the time of the extent, but is to have satisfaction for the injury done him from such stranger. If the *cognizor himself* gives the tenant by statute or *elegit* any interruption, or *prevents him from taking the profits*, there the tenant may either hold over, or bring an action against the cognizor. For as in the first case it would be unreasonable  
60 \* to \*punish the cognizor for the act of a stranger, by keeping him out of his lands; so in the last case it would be equally unreasonable to permit the cognizor by any act of his own, to turn the cognizee out of the land, before he had received his debt. (a)

83. If the tenant by statute or *elegit suffers the land to lie waste*, or neglects to levy the debt out of it, these being his own acts, it is but reasonable he should suffer by them; and *not hold over* the land to the prejudice of the cognizor. On the other hand, where there is no fault or negligence in the cognizee, but he is *prevented* from making the usual profits of the land by the *act of God*, there the *cognizee shall hold over* the time of the extent; for it would be unreasonable to punish him for that which no industry of his could prevent. (b)

84. With respect to the *manner in which estates of this kind are determined*, there is a considerable difference between estates held by statute merchant, statute staple, and recognizance, and those held under a writ of *elegit*.

85. In the case of an *extent* under a statute or recognizance, the *cognizor cannot enter, without suing out a writ of scire facias ad rehabendum terram*; because in these cases the tenant is entitled to hold the land, not only until the principal debt be levied, but also all costs, damages, and expenses arising from it. And as the costs are not ascertained, no entry, which is but an

(a) 4 Rep. 82, u. 2 Roll. Ab. 478.

(b) Idem.

act *in pais*, can defeat a matter of record, until such costs and damages are ascertained by writ of *scire facias*. (a)

86. In the case of an *extent* under a statute or recognizance, the only proper *determination of the estate* held under it is the entry of satisfaction upon the record, or perception of the profits appearing upon record; and a person having a second extent has no title of entry until then. (b)

87. In the case of an *elegit*, where the *debt is certain*, no damages or expenses being allowed, and the annual value of the land being ascertained by the inquisition and extent, when a sufficient time has elapsed to enable the creditor to receive what was due to him from the rents, there is *no reason to object to the entry of the cognizor*; which is therefore lawful.

88. Where the tenant by *elegit* is satisfied his debt by some *casual profits*, the *cognizor cannot enter*, but must bring a *scire facias*; because such accidental profit does not appear in the valuation of the lands, which is stated upon the record. (c)

\*89. No *scire facias* lies upon a general averment that \*61 the cognizee has levied the debt before the time of the extent expired; because this may happen by the cognizee's industry in improving the land, of which the debtor cannot take advantage. (d)

90. But if the cognizee has levied part of the debt by the felling of timber, and has received the rest, as appears from an acquittance, the cognizor shall have a writ of *scire facias*. The reason is, because the object of the extent being only to satisfy the cognizee his reasonable demands, whenever it appears to the Court that they are answered, whether by perception of the profits or otherwise, they will grant a *scire facias* to avoid the extent, and to reinstate the cognizor in his former possession; since the end for which it is given is answered. (e)

91. If the cognizee has levied part of the debt according to the extent, the cognizor, upon tender of the residue in court, shall have a *scire facias* to recover possession of his land, within the time of the extent. For here it appears on record how much was due at first, how much was paid, and what remains due. And the object of the extent being to satisfy the cognizee of his just debt whenever that appears to the Court to have been done,

(a) 4 Rep. 67, a. 2 Roll. Ab. 479.

(b) Dighton v. Greenvil, tit. 85, c. 11.

(c) 2 Roll. Ab. 479.

(d) Id. 483. Bac. Ab. Execution, B. 7.

(e) Idem.

the estate shall cease. But if the cognizor had tendered the remainder of the debt out of court, or if in court he had only offered to come to an agreement with the cognizee, in neither of these cases would a *scire facias* be granted; because it did not appear upon record that the debt was paid. (a)

92. A question having arisen in the Court of Chancery, whether upon an *elegit*, the plaintiff was entitled to *interest beyond the penalty of a judgment*, Lord Hardwicke said, that *at law*, upon a judgment entered up, it was the *debitum recuperatum*, and the stated damages between the parties; but if the creditor did not take out a *fieri facias* against the person of the debtor, or his personal estate, but extended the lands by *elegit*, which the sheriff did only at the annual value, and much below the real, the creditor held *quousque debitum satisfactum fuerit*; and at law, the debtor could not, upon a writ *ad computandum*, † insist upon the creditor's doing more than account for the extended value. But if the debtor came into a *Court of Equity* for relief,

62 \* the Court would give it to him, by obliging the creditor to \* account for the whole that he had received; and as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the penalty. His lordship said, he remembered very well, upon Serjeant Whitaker's insisting before Lord Cowper, that this would be repealing the Statute of Westminster, Lord Cowper said, he would not repeal the statute, but he would do complete justice by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received. (b)

93. When the plaintiff or cognizee's demand is satisfied in this or in any other way, satisfaction ought to be entered on the record of the judgment; or else it should be assigned to a trustee for the owner of the lands.

63 \* 94. It has been already stated, that a *purchaser without notice* of any incumbrances, shall protect himself from them, by obtaining an assignment to a trustee for himself of a prior term for years. The same doctrine has been extended to statutes, recognizances, and judgments. (c)

(a) 2 Roll. Abr. 483. Bac. Abr. Execution, B. 7.

(b) Godfrey v. Watson, 3 Atk. 517. 2 Vent. 238.

(c) Tit. 12, c. 8.

† [Abolished after 31 Dec. 1834, by Stat. 3 & 4 Will. 4, c. 27, § 36, 37, 38.]



95. Thus, where a purchaser of land, incumbered with two statutes, purchased in the first, having no notice of the second; Lord Nottingham said,—“If he had no notice of the second statute, before he was dipped in the purchase, he shall defend himself by the first statute, whether the same were paid off or no. If he can at law do it, equity will not hurt him.” (a)

96. Lord Huntingdon bought a statute affecting certain lands: two years after, he purchased the lands. There was another statute subsequent to that bought in by Lord H.; but prior to his purchase, of which Lord H. had notice at the time when he bought the lands. The Court was of opinion, that although the statute was bought in before the purchase, yet that made no difference in the case, but was as good as if it had been bought in afterwards; therefore Lord H. should be looked upon as a purchaser, having such security to protect his purchase. (b)

97. The effect of getting in old statutes, recognizances, and judgments, in protecting mortgagees, will be discussed in the next title.<sup>1</sup>

(a) Anon. 2 Cha. Ca. 208.

(b) *Huntingdon v. Greenville*, 1 Vern. 49.

<sup>1</sup> In the United States, the liability of the lands of a judgment debtor, to be applied in satisfaction of the execution, depends, in all cases, upon positive statutes, except where the writ of *elegit* has been immemorially used. In *Virginia*, the Statute of Westm. 2, 13 Ed. 1, c. 18, giving this remedy, was recognized, from the settlement of the colony, as part of the common law; and it is still in force, in its main features, as the only remedy in that State; having been modified in some of its details by subsequent legislation. See 1 Lomax, Dig. tit. 12, *per tot.* In the States of *Delaware*, *North Carolina*, *Kentucky*, and *Alabama*, the creditor may have an *elegit*; or may sue out a *fiery facias* for the absolute sale of the lands, at his election.

In all the States, the legal interest in lands, and in some of them the equitable title, of every debtor, may be seized and sold on execution for his debts. The manner of proceeding is so far from uniform, that the mention of only a few of the more general modes is all that will be useful to the student. [In some of the States, “homestead exemption laws,” so called, have been passed, by which lands of the debtor of a certain quantity or value, are exempted from being taken on execution.]

These methods are principally three, namely: 1st, by setting off the land itself to the creditor, with all the debtor's title thereto, at an appraised value; 2dly, by assigning to him the rents and profits, under an *elegit*; and, 3dly, by an absolute sale of the lands, or of the rents and profits, by the sheriff, under a *fiery facias*.

In the New England States, except *Rhode Island*, the first of these modes is pursued, in regard to the freehold estates of the debtor. The execution runs against all the legal property of the debtor, both real and personal, not specifically exempted by law; to either or both of which the creditor may resort, at his election; except, that in *Connecticut*, the land is liable only in default of personal estate, to be shown by the debtor upon demand. *Booth v. Booth*, 7 Conn. 350. In these cases, the land is appraised by

the oaths of three men, appointed by the parties and the sheriff, and is set off to the creditor to hold as the debtor held it, in satisfaction of the execution, with the fees and costs of the levy. The execution, with the appraisement, and the officer's return thereon, is recorded in the registry of deeds, within the time prescribed by law, and is returned to the clerk's office whence it issued; thus making a complete title to the creditor.

In *Maine* and *Massachusetts*, if the debtor is "tenant for life," the execution may, at the creditor's election, be levied on the rents and income only; to be set off to him by appraisement, for such term of time as will satisfy the execution. In *New Hampshire*, the same mode may be adopted in all cases where the debtor is "seised of a rent, or of the income of any real estate." In *Vermont*, the rents and income of all "real estate, leased for life or years," or any other term of time certain or uncertain, may be taken and assigned to the creditor for a period sufficient to satisfy the execution; to be ascertained by the sheriff, if the rents are fixed and certain; otherwise, by appraisement.

In *Vermont*, no seisin is delivered to the creditor, nor can he enter upon the land, until the end of six months after the execution shall have been extended. In *Maine*, *Massachusetts*, *New Hampshire*, and *Connecticut*, the officer delivers seisin and possession to the creditor forthwith. In these States, the debtor may redeem the land by payment of the appraised value and interest, in one year from the levy. In *Vermont*, the time of redemption is limited to six months.

See *Maine*, Rev. St. 1840, ch. 94; *N. Hamp.* Rev. St. 1842, ch. 195; *Mass.* Rev. St. 1836, ch. 73; *Vt.* Rev. St. 1839, ch. 42; *Conn.* Rev. St. 1838, tit. 2, ch. 2.

In all the States not already mentioned, the lands of the debtor may be seized and sold on execution; but in nearly all of them this right of the creditor is subject to some restrictions.

Thus, in some, the land cannot be taken, but in default of personal estate, either to be shown by the debtor, or to be found by the officer in his possession. Such is the case in *Rhode Island*, *New York*, *New Jersey*, *Pennsylvania*, *Delaware*, *North Carolina*, *South Carolina*, [see Act 1849, in relation to the lien of judgments,] *Kentucky*, *Michigan*, *Indiana*, *Mississippi*, *Louisiana*, *Alabama*, and perhaps others.

In some, moreover, the land is liable to be divided into lots or parcels, by the debtor, at his option; in others, this is made the imperative duty of the sheriff, without any election of the debtor; and the lots or parcels are then sold, in the order designated by the debtor. This is the case in *New Jersey*, *Georgia*, *Tennessee*, *Indiana*, *Missouri*, and *Arkansas*.

In other States, the land is first to be appraised by the oaths of persons appointed either by the parties alone, or by them and the officer; the appraisal being probably designed to serve as a basis of judgment for the purchaser; after which it is sold to the highest bidder. Such is the course in *Illinois*; though, in this State, and by a subsequent statute, which seems to be applicable only to a limited class of cases, the land is not to be sold under two thirds the appraised value. Ill. Stat. Feb. 27, 1841; *Brownson v. Kinzie*, 1 How. S. C. Rep. 311; 4 Kent, Comm. 434. But in *Ohio*, *Indiana*, and *Louisiana*, where a similar appraisement is required, the land cannot, in any case, be sold by the sheriff at less than two thirds of its appraised value. In *Indiana*, if this value is not offered, the sheriff returns the fact, and the judgment remains a lien on the land; the creditor being at liberty to sue out an alias execution, and repeat the trial of a sale, at his pleasure. In *Alabama*, there is a similar provision, except that the creditor cannot sue out an alias writ of execution and sell the land, until the end of twelve months from the return of the first execution. In *Louisiana*, if no sale is effected at two thirds of the appraised value, the sheriff adjourns the sale for fifteen days, and then sells it on a credit of twelve months, for the most it will bring.

In *Illinois*, the mansion or place of residence of the debtor, and his personal estate, are not liable to be taken, until his other property is exhausted. In *Indiana*, the officer is not to levy on the principal messuage, lands, or tenements of the debtor, or the place on which he may reside, unless other sufficient property cannot be found by the officer. Nor can lands of the debtor be sold, until the rents and profits have first been appraised, and set up for sale, for a term not exceeding seven years, to satisfy the execution. If they do not produce sufficient for this purpose, the land itself may be sold.

In *Pennsylvania*, before any levy on the land, the sheriff is to ascertain, by an inquiry, whether the clear income and profits of the land for seven years, will suffice to discharge the execution; and if so, to ascertain the clear yearly value; of which he makes return, with his precept. The creditor may then take the land, under a *liberari facias*, to hold until the profits, thus ascertained, shall discharge the debt; or he may elect that the debtor or tenant shall hold under him, at the same rate; and if they refuse the offer, or accept it, but do not pay the rent, the land may be sold.

In *Delaware*, lands yielding no profit may be sold on a *levari facias*; and if the sheriff returns no sale, for want of purchasers, so much of the lands as will satisfy the judgment may be set off to the creditor, under a *liberari facias*, at a value ascertained by appraisers. Lands yielding rents and profits sufficient to satisfy the judgment in seven years, are not liable to be sold; but the whole of such lands are delivered to the creditor, to hold until he is satisfied, by a reasonable extent, as upon writs of *elegit* in England.

In *Michigan*, the lands are first to be appraised at their just cash value, having regard to existing liens, and to the nature of the debtor's interest therein. The sheriff then sets off sufficient, at two thirds of the appraised value, to discharge the execution. If the creditor accepts this in ten days, the sheriff returns the execution and proceedings, and makes a deed to the creditor, who thus obtains the debtor's title to the land. But if the creditor refuses to accept the land, he pays the cost, and the levy is void.

In all the States, where land is sold by the sheriff, he is required previously to advertise the intended sale, and, in most cases, for a certain period of time, expressly mentioned, varying from ten to sixty days; and some statutes require that the sales be made at the county court-house; others, that they be made only in the county town; some, that the sales be in term time; others, that they be only in certain months of the year; or, on certain days of the month; and others impose other conditions; none of which fall within the scope of these notes.

In several of the States, where land is sold on execution, the debtor is allowed a certain time after the levy, in which he may redeem the land by payment of the money, and a specified rate of interest. In *Michigan*, *New York*, and *Illinois*, it is a year; the interest charged being ten per cent.; and, in the two last-mentioned States, any other creditor of the same debtor is allowed three months farther to redeem the land, in order to let in his own debt as a lien. In the same States, and in *Vermont*, the purchaser or creditor has no deed from the sheriff or right of entry on the land, until the time of redemption has expired. In *Pennsylvania*, the purchaser obtains possession by a warrant from the Court, issued on petition, after three months from the sale. In *Delaware*, he may sue out an *habere facias* at any time. In the other States, it seems to be the general course for the sheriff to execute a deed or act of sale forthwith, or by order of Court, to the purchaser, which gives him a right of entry. But in the northern States, where the land is set off to the creditor by appraisement, the sheriff removes the debtor from the premises, and puts the creditor in actual possession; causing the debtor's tenant, if any, to attorn.

In the New England States, the creditor may gain a lien on the real estate of the debtor by an attachment on mesne process; and this lien continues until a certain

period after the rendition of judgment, in order to afford sufficient time to levy the execution. This period, in *Connecticut*, is four months; in *Vermont*, five months; in *Rhode Island*, it is until the return day of the first execution, which is to issue forthwith; and in *Maine*, *New Hampshire*, and *Massachusetts*, it is thirty days. In *New York*, *New Jersey*, *Maryland*, *Virginia*, *North Carolina*, *Ohio*, *Tennessee*, *Georgia*, *Mississippi*, *Florida*, and *Arkansas*, a lien is created either by the rendition or the docketing of judgment, but it may generally be lost by the omission of further diligence on the part of the creditor. In *Illinois*, also, there is a lien by judgment, which continues seven years, provided execution is sued out in a year. In *Missouri*, a similar lien continues absolutely for three years; in *Pennsylvania*, five; and in *Indiana*, ten. In *New York*, a docketed judgment, after ten years, ceases to be a lien against *bonâ fide* purchasers, and against incumbrances created subsequent to the judgment. In *Kentucky*, the lien is created only by delivery of the execution to the officer. In the States out of New England, attachments issue only in certain specified cases.

See *Maine*, Rev. St. 1840, ch. 94; *Massachusetts*, Rev. St. 1836, ch. 73; *New Hampshire*, Rev. St. 1842, ch. 195; *Vermont*, Rev. St. 1839, ch. 42; *Rhode Island*, Rev. St. 1844, p. 114—116; *Connecticut*, Rev. St. 1838, tit. 2, ch. 2.

*New York*, Rev. St. 1845, Part 3, tit. 5, ch. 6, Vol. II. p. 454, 455, 465—467.

*New Jersey*, Elmer's Dig. 1838, p. 486—488; *Reeves v. Johnson*, 7 Halst. 29.

*Pennsylvania*, Dunlop's Dig. 1846, p. 160, 727—729, 733, 735—738, 822.

*Delaware*, Rev. St. 1829, p. 204, 205, 208, 212.

*Maryland*, Laws, Vol. I. p. 616, Stat. 1813, ch. 102; *Ib.* p. 641, Stat. 1816, ch. 129, *Dorsey's ed.*; *Ibid.* Vol. II. p. 1114, ch. 92; *Hanson v. Barnes*, 3 G. & J. 359; *Hindman v. Ringgold*, 1 H. & J. 473; *Miller v. Allison*, 8 G. & J. 35; *McMechen v. Marman*, *Ibid.* 57; *Boring v. Lemon*, 5 H. & J. 223; *Duval v. Waters*, 1 Bland, 569; *Nesbitt v. Dallam*, 7 G. & J. 494.

*Virginia*, Tate's Dig. 1841, p. 360—388; 1 Lomax, Dig. 284—311. *U. States v. Morrison*, 4 Pet. 124; *Burton v. Smith*, 13 Pet. 464, 479.

*N. Carolina*, Rev. St. 1836, Vol. I. ch. 45.

*S. Carolina*, Statutes at Large, Vol. VII. No. 1281, § 87; Vol. VIII. No. 1664, § 2; *Drayton v. Marshall*, Rice, R. 374; *Blake v. Heyward*, 1 Bailey, R. 208. [See the act of 1849, "to amend the law in relation to judgments;" and *Walton v. Dickerson*, 4 Rich. 568.]

*Georgia*, Hotchkiss's Dig. 1845, ch. 22, p. 602—607.

*Florida*, Thompson's Dig. 1847, p. 357, 358.

*Kentucky*, Moreh. & Brown, Dig. 1834, Vol. I. p. 625, 631—635, 640.

*Tennessee*, Caruth. & Nich. Dig. 1836, p. 101—106, 292, 293, 419, 420.

*Michigan*, Rev. St. 1837, p. 323—325, 453, 507; Stat. 1843, No. 75.

*Ohio*, Rev. St. 1841, ch. 63; Walker's Introd. p. 366, 367; 10 Ohio, R. 74; [*Corwin v. Benham*, 2 Ohio, N. S. 36.]

*Indiana*, Rev. St. 1843, ch. 29; *Ib.* ch. 40, p. 389—414, 454, 455, 746—749.

*Illinois*, Rev. St. 1839, p. 389—392. [See Rev. Laws, 1845, p. 550; *Stone v. Wood*, 16 Ill. 177.]

*Missouri*, Rev. St. 1845, ch. 61, 90.

*Mississippi*, How. & Hut. Dig. 1840, ch. 48, p. 621, 625—644; [*Moody v. Harper*, 25 Miss. 484.]

*Alabama*, Toulm. Dig. p. 289—303; Stat. Dec. 23, 1840, (p. 58.)

*Louisiana*, Code of Practice, Art. 646, 664, 665, 670, 671—682.

*Arkansas*, Rev. St. 1837, ch. 60; *Ib.* ch. 23, § 125; ch. 116, § 131. See also 4 Kent, Comm. 428—439.

[Although the lien upon property accrues from the delivery of the execution to the

sheriff, when the process issues from a State court, or to the marshal, when issuing from a federal court, and the rights of creditors claiming under the same jurisdiction are adjudged accordingly, yet the same rule does not hold where a controversy arises between executions issued by a court of the United States and a State court. In such case, whichever officer, whether sheriff or marshal, without reference to the time when the execution was put into their hands, acquires possession of the property first by the levy of the execution, obtains a prior right, and a purchaser at a judicial sale will take the property free from all liens of the same description. *Pulliam v. Osborne*, 17 How. U. S. 471, and cases there cited.]

## TITLE XV.

## MORTGAGE.

## BOOKS OF REFERENCE UNDER THIS TITLE.

- J. J. POWELL. A Treatise on the Law of Mortgages, with Notes by T. Coventry and B. Rand. Boston, 1828.
- R. H. COOTE. Treatise on the Law of Mortgage. Philadelphia, 1837.
- JOHN PATCH. A Practical Treatise on the Law of Mortgage. London, 1821.
- G. SPENCE, on the Equitable Jurisdiction of the Court of Chancery. Part III. Book I. ch. 8.
- SAMUEL MILLER. The Law of Equitable Mortgages, &c. Philadelphia, 1845.
- STORY. On Equity Jurisprudence. Vol. II. ch. 27.
- COKE upon LITTLETON, Lib. 3, cap. 5, fol. 201, *a.*—237, *a.*
- KENT'S COMMENTARIES. Lect. 58.
- BLACKSTONE'S COMMENTARIES. Book II. ch. 10.
- FLINTOFF. On the Law of Real Property. Vol. II. Book I. ch. 6.
- LOMAX'S DIGEST. Vol. I. tit. 13.
- [FRANCIS HILLIARD. Law of Mortgages. Second Edition. Boston, 1856.]

## CHAP. I.

## ORIGIN AND NATURE OF MORTGAGES.

## CHAP. II.

## SEVERAL INTERESTS OF THE MORTGAGOR AND MORTGAGEE.

## CHAP. III.

## EQUITY OF REDEMPTION.

## CHAP. IV.

## PAYMENT OF THE MORTGAGE MONEY AND INTEREST.

## CHAP. V.

## ORDER IN WHICH MORTGAGES ARE TO BE PAID, AND MEANS OF GAINING A PRIORITY.

## CHAP. VI.

## FORECLOSURE.

## CHAP. I.

## ORIGIN AND NATURE OF MORTGAGES.

SECT. 1. *Origin of Mortgages.*7. *Interposition of the Court of Chancery.*11. *Description of a Mortgage.*16. *Mortgages in Fee or for Years.*19. *Welsh Mortgages.*20. *Equitable Mortgages.*SECT. 21. *All Restraints on Redemption are void.*32. *Unless there is an Agreement to purchase.*38. *Cases of Conditional Purchases.*42. *A Power of Sale may be given to a Mortgagee.*

SECTION 1. The *second kind of estate* held as a pledge or security for the repayment of money borrowed is, where lands and tenements are *conveyed by the debtor to the creditor* for that purpose. In the reign of King Henry II., *two modes* of pledging lands \*were in use, which are fully described \*65 by Glanville, and appear to have been adopted from the customary law of Normandy.

2. The *first* of these was called *Vivum Vadium*; and was a conveyance of lands by a debtor to his creditor, to hold until the rents and profits should amount to the sum borrowed; in which case the pledge was said to be living; for, on discharge of the debt, it returned to the borrower.

3. The *second mode* of pledging land was called *Mortuum Vadium*; and is thus described:—"If a feoffment be made upon such condition, that if the feoffor pay to the feoffee £40 of money, that then the feoffor may reënter, &c. In this case, the feoffee is called tenant in mortgage, which is as much as to say in French, as *Mort Gage*, and in Latin, *Mortuum Vadium*. And it seemeth that the cause why it is called *mortgage* is, for that it is doubtful whether the feoffor will pay, at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him forever, and so dead to him upon a condition." (a)

4. It appears from this passage that a mortgage was created by a conveyance of the lands from the debtor to the creditor, with a condition, that if the money was paid on a certain day,

(a) Litt. § 332.

the conveyance should be void ; and the debtor might enter, and have his former estate. But, if default was made in payment of the money on the day appointed, then the lands became absolutely vested in the creditor, freed from the condition. And all the maxims of the common law respecting the breach of a condition were strictly applied to this kind of conveyance. (a)

5. This mode of pledging lands was attended with great inconveniences. If the money was *not paid on the very day* named in the deed, the lands were *absolutely forfeited*; nor would any subsequent tender of the money avail the debtor; although the estate mortgaged were of much greater value than the sum borrowed.

6. Notwithstanding the obvious injustice of this doctrine, the courts of common law would not allow of the smallest degree of liberality in the construction of these kind of conditions. For in the only two cases reported by Lord Coke respecting mortgages, the Judges appear to have held that an estate mortgaged  
66 \* was absolutely \* forfeited and lost, if the condition was not really and *bonâ fide* performed. (b)

7. The doctrine adopted by the courts of common law respecting mortgages being totally contrary to the spirit of this species of contract, and to the principles of justice, subjecting those who borrowed money on the security of their lands to the total loss of them, by the non-performance of the condition; the Court of Chancery was induced to interpose, and by an equitable and liberal construction to mitigate the rigor of the common law.

8. It was obvious that lands mortgaged were only meant to become a security for the payment of what was borrowed ; as it never could be the intention of a person who mortgaged his lands, that a large estate should become the absolute property of a creditor, if a sum of money, much inferior to the value of such estate, was not paid on the day appointed. The *Court of Chancery*, therefore, resolved, that a condition of this kind was *in the nature of a penalty, against which equity ought to relieve*; that all the creditor could in justice and conscience be entitled to, was his principal, interest, and costs; and established it as a ruling maxim, that although the condition was not strictly performed,

(a) Madox Form. No. 560. Kyghly's case, Dyer, 369, a. Tit. 13, c. 2.

(b) Goodall's case, 5 Rep. 95. Wade's case, Id. 114.



by which the estate was forfeited at law, yet, *if the debtor paid the money* borrowed, and interest, *within a reasonable time*, he should be *entitled* to call on the creditor for a *reconveyance of his lands*.

9. *This right* acquired the name of an *equity of redemption*; but it is not ascertained when it was first allowed. Lord Hale is reported to have said, that in 14 Rich. II., the Parliament refused to admit of an equity of redemption. This appears to be a mistake; for, in the case alluded to by Lord Hale, and of which he has stated a part in his history of the Common Law, ch. 3, the mortgagor asserted that he had paid the money, and prayed to have his lands again. Nor did the idea of an equity of redemption exist for some centuries after; for, although Tothill has mentioned a case in 37 Eliz., where a mortgagor had a decree in Chancery for a reconveyance of lands mortgaged, yet no mention is made by Lord Coke of an equity of redemption; from which it may be presumed that it was not then generally known. It is, however, probable, that this doctrine was introduced in the reign of James I., when the Court of Chancery had established its equitable jurisdiction. And in the first year of Charles I., there is a case in which this right is supported as a thing of course. (a)

10. After the allowance of an equity of redemption, there still remained some legal scruples, which subjected the mortgagor to great inconveniences. It was conceived that where the condition was not strictly performed by the payment of the money on the day mentioned in the conveyance, the lands became liable to all the legal charges of the mortgagee; to the dower of his wife, to forfeiture, and escheat; and that the mortgagor could have no relief against those who came in, in the post. But the Court of Chancery, as it increased in power, has set this matter right; and has established a redemption, not only against the tenant in dower, and all those who claim under the mortgagee; but also against the lord by escheat, and all others who come in, in the post; because in equity the payment of the money puts the mortgagor *in statu quo*; since the lands were originally conveyed as a security only for the money borrowed. (b)

(a) 1 Cha. Ca. 219. Rot. Parl. vol. 3, p. 258. Emanuel Coll. v. Evans, 1 Cha. Rep. 10,

(b) Nash v. Preston, Cro. Car. 190. Treat. of Eq. B. 3, c. 1, § 2.

11. A mortgage may therefore be described to be a conveyance of lands by a debtor to his creditor, as a pledge or security for the repayment of a sum of money borrowed;<sup>1</sup> with a proviso

<sup>1</sup> Wherever it appears that there is a debt due, and that the conveyance was made for the purpose of securing the payment of that debt, it is in equity a mortgage. *Parks v. Hall*, 2 Pick. 211, per Wilde, J.; *Briggs v. Fish*, 2 Chipm. 100; *Conard v. Atlantic Ins. Co.* 1 Pet. 386; *Flagg v. Mann*, 14 Pick. 478; 2 Story, Eq. Jur. § 1018; *Wilcox v. Morris*, 1 Murph. 117. Thus, a covenant to reconvey on payment of a sum of money, made contemporaneous with the deed, constitutes a mortgage. *Peterson v. Clark*, 15 Johns. 205; *Blaney v. Bearce*, 2 Greenl. 132; *Colwell v. Woods*, 3 Watts, 188. And this, though there be no separate obligation for the payment of the money. *Rice v. Rice*, 4 Pick. 309; *Wharf v. Howell*, 5 Binn. 499; *Dougherty v. McColgan*, 6 G. & J. 275. But this fact of the want of mutuality, though not conclusive, is to be taken into consideration in determining whether it was intended as a mortgage, or a sale with the right of preëmption. *Flint v. Sheldon*, 13 Mass. 448; *Bodwell v. Webster*, 13 Pick. 415; *Flagg v. Mann*, 14 Pick. 478; *Conway v. Alexander*, 7 Cranch, 237; *Goodman v. Grierson*, 2 Ball & Beatty, 279. If the deed be made to be absolute on the payment of certain notes, but in default thereof to be void, it is a mortgage. *Lincoln and Ken. Bank v. Drummond*, 5 Mass. 321; *Carr v. Holbrook*, 1 Mis. 240. So, if it be for the performance of any other duty, such as the maintenance of the grantor during life. *Lanfair v. Lanfair*, 18 Pick. 299.

[A deed of land, with a stipulation therein, that the title shall not vest in the grantee until the purchase-money is paid, is treated in equity as a mortgage. *Pugh v. Holt*, 27 Miss. (5 Cushm.) 461; *Austin v. Downer*, 25 Vt. (2 Deane,) 558.]

If the language of the deed is plainly that of an intent to make a mortgage, it is decisive; and if the parties had a different intent, the mistake is relievable only in equity, upon a bill specially for that purpose. But if the deed is absolute in its terms, or the meaning is not clear upon its face, parol evidence of the circumstances is admissible, to show that a mortgage was intended. *Colwell v. Woods*, 3 Watts, 188; *Wheeland v. Swartz*, 1 Yeates, 579; *Catlin v. Chittenden*, Brayt. 163; *Lane v. Shears*, 1 Wend. 433; *Walton v. Cronly*, 14 Wend. 63; *Kunkle v. Wolfersberger*, 6 Watts, 126; *Williams v. Owen*, 5 Jur. 114; 10 Sim. 386. [*Miller v. Thomas*, 14 Ill. 428. See *Woodworth v. Guzman*, 1 Cal. 203.]

The following cases afford examples, illustrating the nature of a mortgage, as above stated. *Carey v. Rawson*, 8 Mass. 159; *Stoever v. Stoever*, 9 S. & R. 434; *Wharf v. Howell*, 5 Binn. 499; *Hillhouse v. Dunning*, 7 Conn. 143; *French v. Sturdivant*, 8 Greenl. 246; *Brown v. Dean*, 3 Wend. 208; *Stewart v. Hutchins*, 13 Wend. 485; *Erskine v. Townsend*, 2 Mass. 498; *Taylor v. Weld*, 5 Mass. 109; *Eaton v. Whiting*, 3 Pick. 484.

In *New Hampshire*, it is not sufficient, in order to constitute a mortgage, that the deed be intended as security for the payment of a debt or duty; it must be a deed on condition therein expressed. *N. Hamp. Rev. St. ch. 131, § 2*; *Bickford v. Daniels*, 2 N. Hamp. 71; *Moore v. Esty*, 5 N. Hamp. 469. In *Louisiana*, the exact sum must be expressed in the act of mortgage. *Civil Code Louis. art. 3277*.

Although Courts having general Equity jurisdiction may grant relief in all cases of forfeiture; yet in some States, their jurisdiction in Equity is strictly limited, and mortgages are governed exclusively by statute provisions, by which Courts are authorized, in suits for foreclosure, to ascertain the sum or amount actually due to the creditor, upon payment of which, within a time limited by law or expressed in the decree, the

that such conveyance shall be void on payment of the money borrowed, with interest, *on a certain day*;<sup>1</sup> and in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the lands becomes absolute at law, yet the mortgagor has still an equity of redemption; that is, a right in equity, on payment of the principal, interest, and costs within a reasonable time, to call for a reconveyance of his lands.

12. It was formerly a practice to make a mortgage by an absolute conveyance; with a *defeasance* or clause of redemption in a *separate deed*.<sup>2</sup> Lord Talbot has said that this was a wrong

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lien is discharged. In these cases it has been questioned, whether any deed can be regarded strictly as a mortgage, unless the condition is for the payment of money, or the performance of a contract where the damages are capable of computation by the Court; and whether, therefore, conditions for general support, comfort and maintenance, good behavior, and the like, are susceptible of relief, unless under a general equitable jurisdiction. In *Lanfair v. Lanfair*, *supra*, a condition for maintenance was held to constitute a mortgage; but the distinction above alluded to does not appear to have been taken. So, in *Noyes v. Sturdivant*, 6 Shepl. 104. In such cases, however, the damage for breach of the covenant for maintenance is susceptible of computation, by the value of board by the week. And see *Colman v. Packard*, 16 Mass. 39. In *Massachusetts*, this question has been subsequently settled in the affirmative, by Rev. St. ch. 107, § 6, 23. So, in *Maine*, Rev. St. 1840, ch. 125, § 15. And in *New Hampshire*, Rev. St. 1842, ch. 131, § 1. And see *Holmes v. Fisher*, 13 N. Hamp. R. 9.

In England, a debt, in the popular sense of the term, seems to be considered as of the essence of a mortgage. See 2 Atk. 435; *Williams v. Owen*, 5 My. & Cr. 303.

[A mortgage purporting to secure a bond, is not good without the bond, unless it appear that the mortgagee is entitled to the possession of the bond. And the assignee of such mortgagee stands in no better position. *Garroch v. Sherman*, 2 Halst. Ch. R. 219.]

<sup>1</sup> It is not essential to a mortgage that a day be named for the payment; since, if none is named, the law implies that the money is payable forthwith. See *Parks v. Hall*, 2 Pick. 211.

<sup>2</sup> To constitute a *defeasance*, the two deeds must be *delivered* contemporaneously; but it is not necessary that they bear the same date. *Harrison v. Phillips Academy*, 12 Mass. 456; *Newhall v. Burt*, 7 Pick. 157; *Scott v. McFarland*, 13 Mass. 309; *Hale v. Jewell*, 7 Greenl. 435. This is all that was intended by the Court in *Bennock v. Whipple*, 3 Fairf. 346; though it is there gratuitously said that the dates must be the same. See further, tit. 32, ch. 7. [*South Baptist Society of Albany v. Clapp*, 18 Barb. Sup. Ct. 36; *Bryan v. Cowart*, 21 Ala. 92.] A contemporaneous covenant or bond, for a reconveyance of the land upon payment of a certain sum of money, is a sufficient defeasance to constitute a mortgage. *Peterson v. Clark*, 15 Johns. 205; *Erskine v. Townsend*, 2 Mass. 493; *Wharf v. Howell*, 5 Binn. 499; *Rice v. Rice*, 4 Pick. 349. But it does not always and of itself constitute the transaction a mortgage, unless the contract is a security for the repayment of money. *Hicks v. Hicks*, 5 G. & J. 75. [A deed absolute on its face, had written on its back a condition, of even date with the deed, but not signed, that if the grantor paid a certain note therein described, the deed should become void; *held*, that the whole together constituted a mortgage.

way, and to him always appeared with a face of fraud; for the defeasance might be lost, and then an absolute conveyance set up: he would discourage the practice as much as possible. And Lord Hardwicke has said, that wherever the Court finds a clause of redemption in a separate deed, it adheres to it strictly to prevent the equity of redemption from being entangled, to the prejudice of the mortgagor. (a)

13. The Court of Chancery, having thus extended its 68 \* protection \* to the mortgagor, by allowing him to redeem his estate after it was forfeited at law, it also gave the *mortgagee a right, in a reasonable time* after forfeiture, to call on the mortgagor for payment of his money, or else to be forever *foreclosed* or excluded from any further equity of redemption.

14. As money borrowed on mortgage is seldom paid on the day appointed, mortgages are now become entirely subject to the Court of Chancery, where it is an established rule that the mortgagee holds the estate merely as a pledge or security for the repayment of his money; therefore a *mortgage* is considered in *equity as personal estate*. The mortgagor is held to be the real owner of the land, the debt being esteemed the principal, and the land the accessory.<sup>1</sup> Whenever the debt is discharged, the interest of the mortgagee in the land determines of course; and he is looked on in equity as a trustee only for the mortgagor.<sup>2</sup>

(a) Forrest, Rep. 63. *Baker v. Wind*, 1 Ves. 160.

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*Whitney v. French*, 25 Vt. (2 Deane,) 663. If a deed be absolute in the first instance, and a defeasance be executed subsequently, it will relate back to the date of the principal deed, and connect itself with it, so as to render it a security in the nature of a mortgage. *Scott v. Henry*, 8 Eng. (13 Ark.) 112. To make the bond operate as a defeasance as against subsequent purchasers, it must be recorded, or actual notice to them of its existence be shown. *Purington v. Pierce*, 38 Maine, (3 Heath,) 447.]

In *New Jersey*, *Delaware*, and *Illinois*, if the deed is absolute on its face, any other writing, whether under seal or not, is sufficient to constitute the transaction a mortgage. But to be available as a defeasance, the instrument must be recorded in the registry of deeds where the mortgage deed is to be recorded. In the two former States, it is made the duty of the mortgagee to cause an abstract of the writing to be registered, with the mortgage deed. In *Illinois*, the instrument must be registered by the mortgagor, within thirty days after the absolute deed is recorded. *Elmer's Dig.* LL. N. Jers. p. 86; *Delaware*, Rev. St. 1829, p. 91; *Illinois*, Rev. St. 1839, p. 150. [*Kintner v. Blair*, 4 Halst. Ch. R. (N. J.) 485.]

<sup>1</sup> This view of the nature of a mortgage, is familiar in the United States; the debt being everywhere treated as the principal, and the mortgage as only the incident; though, at common law, the legal title, as between the parties, is in the mortgagee.

<sup>2</sup> See *post*, ch. 2, § 41, 42, note.

15. In all modern mortgages there is a *covenant* inserted from the mortgagor, for himself, his heirs, executors, and administrators, to *repay* the money borrowed, with interest; which creates a personal contract between the mortgagor and the mortgagee, for the payment of the money.<sup>1</sup>

<sup>1</sup> In some of the United States, and probably in nearly all of them, the general practice is not to insert in the deed a covenant for repayment of the money, but to take a separate obligation, either by bond or promissory note. The deed only contains a proviso, that if the money be paid at such a day, then the deed, as also the obligation, describing it, shall both be void. Sometimes, however, no separate security is taken, and of course none is mentioned in the deed; but the proviso is merely that if such a sum is paid by such a day, the deed shall be void. In such case it becomes a question whether the mortgagee can have an action at law for the money, or whether his sole remedy is against the land.

It is clear that the absence of any bond or other express obligation to pay the money, will not make the instrument less effectual as a mortgage, if the mortgagor had the money. 4 Kent, Comm. 145; Floyer v. Lavington, 1 P. Wms. 268; Cope v. Cope, 2 Salk. 449; Ancaster v. Mayer, 1 Bro. Ch. Ca. 464; Smith v. People's Bank, 11 Shepl. 185.

But the material questions are, whether such a deed is conclusive evidence of indebtedment;—and whether it is evidence of any *personal* liability at all, or only of a lien on the land.

The case usually cited as authority for the conclusive character of the evidence, is that of King v. King, 3 P. Wms. 358, per Lord Talbot, C. But in that case there was also a bond for repayment of the money; and the saying that “every mortgage implies a loan,” was extrajudicial. The question was, whether the debt should be paid out of the personalty, in relief of the devisee of the mortgaged premises.

The general question, whether the *proviso*, that the deed should be void on the payment of a sum of money, imported a *covenant* to pay, was settled in the negative, in Briscoe v. King, Cro. Jac. 281; Trin. 9 Jac. I., Yelv. 206, S. C. And see accordingly, Suffield v. Baskerville, 2 Mod. 36; Pasch. 27 Car. 2; 4 Kent, Comm. 145; Tooms v. Chandler, 3 Keb. 454, 460. (In the report of this case, in 2 Lev. 116, it is said that judgment was for the plaintiff; but as the reporter speaks of two hearings, at the first of which Twysden was opposed to Hale in opinion, and as he refers to Cro. Jac. 281, and Yelv. 206, for a “like” judgment, it is plain that his report of the judgment is wrong, and that it was for the defendant.) See also Howell v. Price, 2 Vern. 701; 1 P. Wms. 291; Prec. Chan. 423, 477, S. C.; where the Chancellor was at first clear that there was no debt; and changed his opinion only upon the particular language of the will and other evidence in the case. 4 Vin. Abr. 456, pl. 9, note. On the above authorities it is laid down, in Platt on Cov. 37, that no action lies on a proviso, without an express covenant, or other evidence in the deed, of an agreement to pay. Salisbury v. Philips, 10 Johns. 57, acc. So it was also expressly held in Drummond v. Richards, 2 Munf. 337. And see South Sea Co. v. Duncombe, 2 Barnard, 50, where stock was pledged for a contemporary loan; which probably is the case alluded to by the Lord Chancellor in King v. King, 3 P. Wms. 360; Scott v. Fields, 7 Watts, 360; Hunt v. Lewin, 4 Stew. & Port. 150; Elder v. Rouse, 15 Wend. 218.

The general position, that the mortgagee is a simple contract creditor, where there is no express covenant to pay, which is stated in King v. King, *supra*, was repeated by Lord

16. Mortgages are of *two sorts*; either the lands are conveyed to the mortgagee and his heirs in *fee simple*, with a *proviso*, that if the mortgagor pays the money borrowed on a certain day, the mortgagee *will reconvey the lands*; or else the lands are conveyed to the mortgagee, his executors, administrators, and assigns, for a long term of years; with a *proviso*, that if the money borrowed is repaid on a certain day, *the term shall cease*, and become void.

17. In the case of *mortgages for terms of years*, if the money is not paid on the day appointed, the estate becomes *absolutely vested, at law*, in the mortgagee, for the residue of the term. And although a court of equity allows the mortgagor to redeem

Thurlow in *Ancaster v. Mayer*, 2 Bro. Ch. Ca. 464, and is found in *Cope v. Cope*, 2 Salk. 449, and elsewhere. But in those cases it was not decided that a deed, with a proviso of defeasance on the payment of a sum of money, was evidence, *per se*, of a debt of that amount, to be enforced in a court of law. The question pending was whether, if the debt were clearly proved or admitted, as in those cases it was, the personal estate, having been augmented by the loan, should first contribute to its repayment. It was purely a case of marshalling of assets and liabilities in equity, and not a question of liability at law.

In another class of cases it has been held, that if there be evidence of a debt, independent of the deed, and the deed merely ascertains or recognizes the amount of the debt, but contains no covenant to pay, the existence of the deed will not bar an action of *assumpsit* or other proper remedy for the money. *Tilson v. The Warwick Gas Light Co.* 4 B. & C. 968; *Yates v. Aston*, 4 Ad. & El. 182, N. S.; *Burnett v. Lynch*, 5 B. & C. 589; *Elder v. Rouse*, 15 Wmd. 218. But this is a question totally different from the one under consideration.

On the whole, it may be collected from the authorities, that the deed, in these cases, is merely evidence of a lien on the land, or of a conditional sale, unless it contains an admission of a debt due; though the admission need not be in direct terms; and that if the debt is either admitted in the deed, or can be proved *aliunde*, it may be sued for and recovered as though no mortgage had been given; unless, from the evidence, it appears to have been the agreement of the parties that the land alone should be resorted to. Where it is the usage to give a separate obligation for the debt, the omission to give it would be cogent evidence of a mutual intent that the land should afford the only remedy. In *Salisbury v. Philips*, 10 Johns. 57, such agreement was inferred from the power to sell, contained in the deed. See *Conway v. Alexander*, 7 Cranch, 237; *Hills v. Elliot*, 12 Mass. 33; 1 Powell on Mortg. 61, n.; 2 Powell on Mortg. 774, n. 866, n. (Rand's ed.); *Wharf v. Howell*, 5 Binn. 499; 4 Kent, Comm. 145.

In *New York*, it is expressly enacted, that if the deed contains no express covenant for payment of the money, and there be no separate agreement for that purpose, the mortgagee's remedy shall be confined to the land. *N. York, Rev. Stat. Vol. II. p. 22, § 139, 3d ed.*; [*Weed v. Covill*, 14 Barb. Sup. Ct. 242.] So in *Indiana. Rev. St. 1843, ch. 29, § 31.*

[A mortgagee, having the legal title, is not ousted by his note, to secure which the mortgage was given, being barred by the Statute. *Ohio Co. v. Winn*, 4 Md. Ch. Decis. 253; *Richmond v. Aiken*, 25 Vt. (2 Deane,) 324.]

within a reasonable time, by paying the principal, interest, and costs, yet such payment only gives the mortgagor an equitable right to the term.

18. Mortgages *for years* are attended with this *advantage*, that on the death of the mortgagee, the term and the right to receive the mortgage debt vest in the same person; whereas, in the case of a mortgage in fee, the estate, on the death of the mortgagee, goes to his heir or devisee; and the money is payable \*to his executor or administrator. This produces a separation of rights, that is often attended with great inconveniences, both to the mortgagor and representatives of the mortgagee. On the other hand, in the case of mortgages for years, there is this defect, that if the right of redemption is abandoned or foreclosed, the mortgagee, or his personal representatives, will only be entitled to the term. To guard against this, it has been thought advisable, in some cases, to make the mortgagor covenant that, on non-payment of the money, he will not only confirm the term, but also convey the freehold and inheritance to the mortgagee, or as he shall appoint, discharged from all right of redemption.<sup>1</sup>

19. There is another kind of mortgage, where the proviso for redemption does not oblige the mortgagor to pay the money on a particular day, but allows him to do it at any indefinite time. This is called a *Welsh mortgage*, in which there is a perpetual right of redemption.<sup>2</sup>

20. Legal mortgages are made by a transfer of the legal estate

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<sup>1</sup> In the United States, the subject of mortgages has universally been regulated, to various extents, by express statutes, by which the executor or administrator is generally made competent, on payment of the money, to discharge the mortgage. From this, or some other cause, it has been nearly the uniform practice to make the mortgage in fee simple; and a mortgage of a less interest than the mortgagor owns is seldom known, unless in special cases.

<sup>2</sup> In a Welsh mortgage, the profits are set against the interest; and of course there is no presumption of foreclosure, arising from the length of time in which the mortgagee has been in possession. But if the profits are excessive, the Court will decree an account against the mortgagee, notwithstanding the agreement. *Talbot v. Braddil*, 1 Vern. 395; *Fulthrope v. Foster*, Ibid. 476; 1 Pow. on Mort. 373 a, and note (E.) Sometimes the mortgage is made upon trust, that the mortgagee shall, after discharging the interest and expenses, apply the surplus of rents and profits towards the payment of the principal sum. This also is termed a Welsh mortgage; of which a precedent will be found by the student in 3 Pow. on Mort. 1148 a. See also Coote on Mortgages, p. 207.

to the mortgagee, by a regular conveyance. But an *agreement* in writing to transfer an estate as a security for the repayment of a sum of money borrowed,<sup>1</sup> or even a *deposit of the title deeds* of an estate, as a security, will create what is called an *equitable mortgage*.<sup>2</sup> And Lord Eldon has held that an equitable lien

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<sup>1</sup> *Delaine v. Keenan*, 2 Desau. 74. [A valid mortgage of real estate may be created by a written instrument not under seal. *Woods v. Wallace*, 22 Penn. (10 Harris,) 171. And an agreement in writing, though not witnessed as the statute requires in conveyances of real estate, intending to give a lien on real estate for the payment of a debt, is good as an equitable mortgage. *Mann v. Godfroy*, 1 Mann. (Mich.) 178.]

<sup>2</sup> Whether the deposit of title deeds alone will create an equitable lien on the land, in any of the United States, may well be doubted. No case is found in which this doctrine has been actually administered, though in several cases it has been adverted to, as a rule of law in England. Its history in that country is thus stated by Chancellor Kent. "It is now well settled in the English law, that if the debtor deposits his title deeds with a creditor, it is evidence of a valid agreement for a mortgage, and amounts to an equitable mortgage, which is not within the operation of the Statute of Frauds. The earliest leading decision in support of the doctrine of equitable mortgages, by the deposit of the muniments of title, was that of *Russell v. Russell*, in 1783, (1 Bro. 269.) It was followed by the decision in *Birch v. Ellames*, (2 Anst. 427,) and the principle declared is, that the deposit is evidence of an agreement to make a mortgage, which will be carried into execution by a court of equity, against the mortgagor and all who claim under him, with notice, either actual or constructive, of such deposit having been made. Lord Eldon and Sir William Grant considered the doctrine as pernicious, and they generally expressed a strong disapprobation of it, as breaking in upon the Statute of Frauds, and calling upon the Court to decide, upon parol evidence, what is the meaning of the deposit. But the decision in *Russell v. Russell*, has withstood all the subsequent assaults upon it, and the principle is now deemed established in the English law, that a mere deposit of title deeds upon an advance of money, without a word passing, gives an equitable lien. The decisions on this subject have, however, shown a determined disposition to keep within the letter of the precedents, and not to give the doctrine further extension; and it is very clear, that a mere parol agreement to make a mortgage, or to deposit a deed for that purpose, will not give any title in equity. There must be an actual and *bonâ fide* deposit of all the title deeds with the mortgagee himself, in order to create the lien. Nor will such an equitable mortgage be of any avail against a subsequent mortgage, duly registered without notice of the deposit; and if there be no registry, it is the settled English doctrine, that the mere circumstance of leaving the title deeds with the mortgagor is not, of itself, in a case free from fraud, sufficient to postpone the first mortgagee to a second, who takes the title deeds with his mortgage, and without notice of the first mortgage." 4 Kent, Comm. 150, 151. See also 2 Story, Eq. Jur. § 1020, where the passage just quoted is mentioned with approbation. No American case is cited by either of those learned jurists in favor of this doctrine. In England, and as against strangers, this kind of mortgage, by the deposit of title deeds, can occur only in those cases where the possession of them can be accounted for in no other manner, except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and to the lands. *Bozon v. Williams*, 3 Y. & J. 150; *Allen v. Knight*, 11 Jur. 527. And see *ex parte Hooper*, 19 Ves. 479. The circumstance of leaving the



may be obtained on a copyhold estate by a deposit of the copy of court roll. (a)<sup>1</sup>

(a) *Edge v. Worthington*, 1 Cox, R. 211. *Hooper*, ex par. 19 Ves. 476. Ex parte *Warner*, 19 Ves. 202. Id. 209.

title deeds in the hands of the mortgagor can be of no avail here, against the mortgagee, and in favor of a subsequent incumbrancer, where those deeds have been registered; because it is the general and probably the universal practice for the grantor to retain in his own hands all the muniments of his title; copies of the record of deeds being competent evidence in the proof of title in all cases, except those of the grantor when offered by the grantee himself, who has the primary evidence in his own hands. 1 Greenl. on Evid. § 571, n. And if the deeds have not been registered, though the leaving of them in the hands of the mortgagor may in general be *prima facie* evidence of gross neglect, especially where the entire premises are mortgaged; yet it is not conclusive, but is open to explanation on the part of the prior mortgagee. *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. R. 603; *Johnson v. Stagg*, 2 Johns. R. 510, 522; *Magwood v. Lubbock*, 1 Bailey, Eq. R. 382.

1 There are three descriptions of cases which are treated as mortgages in Courts of Equity. First, where the relation of debtor and creditor, in respect of the money which formed the consideration of the conveyance, is still subsisting; for here it is manifest that the land is collateral to the debt, and was intended merely as security for the payment. This relation is essential to every mortgage, founded on the agreement of the parties. *Conway v. Alexander*, 7 Cranch, 218, 237; *Flagg v. Mann*, 2 Sumn. 490, 534; *Oldham v. Halley*, 2 J. J. Marsh. 114. Thus, a conveyance to the creditor in trust to satisfy his own demand, is a mortgage. *Channing v. Cox*, 1 Rand. 306. And see *James v. Johnson*, 6 Johns. Ch. 417; 2 Cowen, 246, S. C.; *Reed v. Landale*, *Harden*, R. 6; *Vernon v. Bethell*, 2 Eden, 110. [*Bank of Westminster v. Whyte*, 3 Md. Ch. Decis. 508.]

Secondly, cases of fraud on the part of the creditor, or of such misconduct as ought in equity to admit the debtor to a right to redeem the land. Thus, a purchaser at a sheriff's sale, under a contract with the debtor that he may redeem, will be regarded only as a mortgagee. *Yoder v. Standiford*, 7 Monroe, 480; 2 Story, Eq. Jur. § 1018. [*Barkalew v. Taylor*, 4 Halst. Ch. R. 206; *Cornell v. Pierson*, Ib. 478.]

Thirdly, cases where, by accident or mistake, an absolute conveyance was made, when only a mortgage was intended. *Joyes v. Statham*, 3 Atk. 388, 389; 2 Story, Eq. Jur. § 1018, 768.

In all these cases, parol evidence is admissible to show the actual transaction, and the circumstances of the case. 1 Story, Eq. Jur. § 153, 156, 330; 2 Story, Eq. Jur. § 770 a. 1018; *Marks v. Pell*, 1 Johns. Ch. 594; *Murphy v. Trigg*, 1 Monroe, 73; *Clark v. Henry*, 2 Cowen, 324; *Washburn v. Merrills*, 1 Day, 139; *Whittick v. Kane*, 1 Paige, 202; 1 Pow. on Mortg. 120, note (2) by Mr. Rand. See also the cases cited by Mr. Perkins in his edition of 1 Bro. Ch. Ca. 86, note (a); *May v. Eastin*, 2 Port. 414; *Green v. Bonnell*, 1 Green, Ch. 264. [*Russell v. Southard*, 12 How. U. S. 139; *Bacon v. Brown*, 19 Conn. 29; *Hodges v. Insurance Co.* 4 Selden, 416; *Cole v. Bolard*, 22 Penn. (10 Harris,) 431; *Bank of Westminster v. Whyte*, 1 Md. Ch. Decis. 536; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Bryan v. Cowart*, 21 Ala. 92; *Prewett v. Dobbs*, 13 S. & M. 431; *Jordan v. Fenno*, 8 Eng. (13 Ark.) 593; *Johnston v. Huston*, 17 Mis. (2 Bennett,) 758; *Miller v. Thomas*, 14 Ill. 428; *Cottrell v. Long*, 20 Ohio, 464.]

Where the deed is absolute in its terms, but the grantor claims it to be in truth only

21. When the Court of Chancery assumed a jurisdiction over mortgages, it became an established rule there that every conveyance of a real estate, for the purpose of securing the repayment of a sum of money, should be considered as a mortgage; that all restraints imposed upon the equity of redemption should be relieved against; being in fact terms extorted from the necessities of the borrower, and tending to usury and oppression. The *right of redemption* is therefore considered in equity as *inseparably incident* to a mortgage, and *cannot be restrained* by any clause or agreement whatever; it being a rule there, that what was once a mortgage, must always continue to be a mortgage.<sup>1</sup>

22. Thus a proviso to redeem, during the life of the mortgagor only, was held void; and it was decreed that the heir of the mortgagor should notwithstanding redeem. (a)

23. So, where the right of redemption was restrained to  
70\* the \* mortgagor himself, or the heirs of his body, it was held void; and a jointress was allowed to redeem. (b)

(a) *Jason v. Eyres*, 2 Cha. Ca. 32. *Orde v. Smith*, Sel. Ch. Cas. 9; 2 Eq. Cas. Ab. 600, S. C.

(b) *Infra*, c. 3.

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a mortgage, the burden of proof is on him, to show the real intent of the parties, and that the present form of the transaction arose from ignorance, accident, mistake, fraud, or undue advantage taken of his situation. *McDonald v. McLeod*, 1 Ired. Eq. R. 221; *Lewis v. Owen*, Ibid. 291. [6 Ired. Eq. 38, 283<sup>2</sup>; 8 Ib. 192; Bus. Eq. 88; *Austin v. Downer*, 25 Vt. (2 Deane,) 558.]

In *Maine* and *Massachusetts*, the statutes recognize only two modes of creating a mortgage to which the chancery jurisdiction of the Courts extend; namely, by *proviso* inserted in the deed, and by a separate deed of defeasance. All equitable mortgages, created by contract of the parties, seem therefore to be excluded. Relief, if any, in other cases, must be referred to the head of fraud, trust, or accident and mistake. See *French v. Sturdivant*, 8 Greenl. 250, 251; *Ersine v. Townsend*, 2 Mass. 493; *Bodwell v. Webster*, 13 Pick. 411, 413; *Flint v. Sheldon*, 13 Mass. 443; *Mass. Rev. St. ch. 107*, § 34; *Maine Rev. St. ch. 125*, § 1.

[Equity will treat as a mortgage, a deed absolute in form, when it appears from the bill, answer and proofs that it was intended merely to secure a debt, or indemnify against liabilities. *Howe v. Russell*, 36 Maine, (1 Heath,) 115. So where the grantee admits that a deed absolute on its face was given him as security for indebtedness. *Bigelow v. Topliff*, 25 Vt. (2 Deane,) 273.]

Such is also the law of New Hampshire. *N. Hamp. Rev. St. ch. 131*, § 1, 2, 3; *Lund v. Lund*, 1 N. Hamp. 39.

<sup>1</sup> *Newcomb v. Borham*, 1 Vern. 8. See also 2 Story, Eq. Jur. 1019; *Holridge v. Gillespie*, 2 Johns. Ch. 34; 4 Kent, Comm. 142; *Jaques v. Weeks*, 7 Watts, 261; *Wright v. Bates*, 13 Verm. R. 341; *Clark v. Henry*, 2 Cowen, R. 324; *Wheeland v. Swartz*, 1 Yeates, 584; *Crane v. Bonnell*, 1 Green, Ch. 264.

24. Lands were mortgaged with a special clause, that if the mortgagor, or the heirs male of his body, should pay the money borrowed, they might reënter; and the mortgagor agreed that no one but himself, or the heirs male of his body, should be admitted to redeem. The mortgagor having died without issue, the plaintiff being a jointress of part of the lands, brought her bill to redeem the mortgage. It was insisted for her: 1. That restrictions of redemption in mortgages had always been discouraged, as it would be a thing of mischievous consequence should they prevail; for then it would become a common practice, and a trade amongst scriveners, to fetter mortgagors, so as to make it impracticable for them to redeem, according to the precise letter of the agreement. 2. It was a maxim in Chancery that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and a mortgage can no more be irredeemable than a distress for a rent-charge irrepleviable. After long debate, the Lord Keeper decreed that the mortgage should be redeemed; the rather because the defendant had a covenant for repayment of his mortgage money. (a)

25. Where lands are mortgaged, an agreement made *at the time*, that *in case the money is not paid on a particular day*, the conveyance shall become absolute, will not be allowed in Chancery.<sup>1</sup>

26. A person seised of lands worth £200 per annum, mortgaged the same for £250, and executed a deed for the absolute conveyance of them to the mortgagee, if the money was not paid at the end of seven years. The Master of the Rolls, assisted by Mr. Justice Hyde, decreed a redemption; for the mortgagee's father having exhibited a bill against the mortgagor for the land, or the money, made it evident that it was a mortgage; therefore no agreement could take away the right of redemption. (b)

(a) Howard v. Harris, 1 Verm. 33, 190. (Wilcox v. Morris, 1 Murph. 117.)

(b) Bowen v. Edwards, 2 Rep. in Cha. 221.

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<sup>1</sup> "I believe no case can be found, in which it has been determined that the mortgagee can, by force of any agreement made at the time of creating the mortgage, entitle himself, at his own election, to hold the estate free from condition, cutting off the right in equity of the mortgagor to redeem." Per Hubbard, J., in *Waters v. Randall*, 6 Met. 479, 484.

[A proviso in a mortgage that the whole of several instalments shall become due upon failure to pay any instalment on the day, is in the nature of a penalty against which equity will relieve upon adequate compensation. *Tiernan v. Hinman*, 16 Ill. 400.]

27. An agreement that in case money lent on mortgage is not paid on the day appointed, then that *upon payment of a further sum* by the mortgagee, the conveyance shall become absolute, will not be allowed.<sup>1</sup>

28. A person mortgaged his estate for £200, and at the same time entered into a bond conditioned that if the £200 and interest was not paid at the day, then if the mortgagee  
71 \* should pay \* the mortgagor the further sum of £78 in full for the purchase of the premises, within ten days after, the bond should be void, or else should stand in full force. \*The mortgagor died before the mortgage became forfeited, leaving his son an infant; and the £200 not being paid at the day, the mortgagee paid the £78. The son of the mortgagor brought his bill to redeem. The defendant by his answer, insisted that it was an absolute purchase: but the Court decreed a redemption. (a)

29. The defendant Ward lent £16,000 to one Neale on mortgage, to carry on his buildings; and in another deed, executed at the same time, he took a covenant from Neale that he would convey to him, if he thought fit, ground rents to the value of £16,000, at the rate of twenty years' purchase. The bill being to redeem, the defendant insisted on that agreement. The Master of the Rolls decreed a redemption, on payment of principal, interest, and costs, without regard to that agreement, setting it aside as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it; or clog the redemption with any by agreement. (b)

30. No *subsequent agreement* entered into by the creditors and assignees of a mortgage, *to restrain the right of redemption* to a particular period, will be deemed valid in equity.

31. A person having made a mortgage, and the equity of redemption being subject to the payment of several debts, the mortgagee exhibited his bill against the mortgagor, and all the creditors, that they should redeem, or be foreclosed. Greaves, who was one of the defendants, and also a creditor, paid the

(a) *Willet v. Winnell*, 1 Vern. 488. (*Price v. Perrie*, 2 Freem. 258.)

(b) *Jennings v. Ward*, 2 Vern. 520.

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<sup>1</sup> But where the mortgage deed contained an agreement that in case the estate was to be sold, the mortgagee should have the preëmption; the agreement was held binding, if claimed in a reasonable time. *Orby v. Trigg*, 2 Eq. Cas. Abr. 599.

mortgage money with the consent of the other creditors; and agreed with them, that if they would pay the money advanced by him, at a further day, they should redeem; otherwise that he should have the lands absolutely. The creditors failed to pay the money at the time agreed on; Greaves enjoyed the lands for twenty years, after which the creditors exhibited their bill to redeem. The Lord Keeper decreed a redemption, because those lands, by the new agreement, became a mortgage, in respect of the other creditors, in the hands of the defendant; in regard of the trust and confidence which they had in the defendant, being all creditors alike; and principally, because the mortgagee had assigned \* to Greaves his mortgage only, not the \*72 benefit of the decree for foreclosing the redemption. (a)

32. A *distinction* has been made by the Court of Chancery between *contracts originally founded* upon lending and borrowing money, with an agreement for a purchase in a certain event; and cases where, *after a mortgage, a new agreement* has been entered into, and executed by the parties, for an absolute purchase; although there be a subsequent declaration that the mortgagor may have his estate upon payment of principal, interest, and costs; or where a release of the equity of redemption is given with a collateral agreement to reconvey upon payment of the purchase-money; for in these cases it has been held that no repurchase shall be had, unless upon a strict performance of the conditions stipulated.

33. A, being a joint tenant with B, her sister, made an absolute conveyance to C, in fee for £104, which was admitted to be intended only as a mortgage. Some time after, in 1708, those deeds were cancelled; and then A, in consideration of £184, including the £104, paid by C, conveyed the estate *ut supra*, but with a further covenant, not to agree to any partition without C's consent. B was in possession till 1710, when C, ejecting her out of her moiety, enjoyed it quietly till 1726, at which time A brought a bill for redemption, to which C pleaded himself an absolute purchaser; the receipts given for the money mentioned it to be purchase-money. In 1710, there was an agreement that A might have the estate again if desired, on payment of principal, interest, and charges. The cause was first

(a) *Exton v. Greaves*, 1 Vern. 138. (Anon. 2 Haw. 26.) *Spurgion v. Collier*, 1 Eden, 55. *England v. Codrington*, Id. 169.

heard before the Master of the Rolls, who dismissed the bill: afterwards it came on before Lord Talbot, who observed, the case was very dark. The first deed was admitted to be a mortgage; the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous; but that it would be equally so, if the deed was supposed to be an actual conveyance; so that it was of no great weight, and ought to be laid out of the question. He was inclined upon the whole to think the conveyance in 1708 was at first an absolute  
 73\* conveyance; the agreement in 1710 for\* the repurchase showed it was not redeemable at first; the acquiescence of sixteen years upon C's possession was strong evidence of it. The decree was affirmed upon the circumstances of the case. (a)

34. Lands in Wales were mortgaged for £400. Afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor upon payment of £350 more. A note was given at the time of executing the release, that the releasee, on payment of the £750, and all charges of repairs, within a year, by the releasor, would sell and convey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned; but not that the releasor should be at liberty to redeem the same. The decree was affirmed by the House of Lords. (b)<sup>1</sup>

(a) *Cotterel v. Purchase*, Ca. Temp. Talbot, 61.

(b) *Endsworth v. Griffith*, 2 Ab. Eq. 595. 5 Bro. Parl. Ca. 184.

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<sup>1</sup> Where a mortgage was made by a principal debtor to indemnify his surety, and after the surety had been compelled to pay the debt, the parties entered into a further agreement in writing that the mortgagee should have an absolute conveyance of the land in satisfaction of his claim, at a price to be ascertained by appraisers; and that if the value, thus found, should exceed the debt, the mortgagee should pay the excess in one year; it was held in Equity to be a valid transfer of the equity of redemption; and that the mortgagee, upon tender of the excess to the executor of the mortgagor, was entitled to an absolute conveyance. *Austin v. Bradley*, 2 Day, 466.

35. Where money is *lent by one relation to another*, with a proviso that if it be not repaid on a certain day, the land shall be settled in a particular manner, *for the benefit of the family*; a court of equity will not decree a redemption.

36. A, in consideration of £1000, made an absolute conveyance to B of the reversion of certain lands, after two lives, which at that time were worth little more. By another deed of the same date, the lands were made redeemable at any time during the life of the grantor only, on payment of £1000 and interest. A died, not having paid the money: it was held by Lord Nottingham, that his heir might redeem, notwithstanding this restrictive clause; and that it was a rule, *once a mortgage, always a mortgage*; that B might have compelled A to redeem in his lifetime, or have foreclosed him. But, on a rehearing, Lord Keeper North reversed the decree, on the circumstances of the case; for it appeared by proof, that A had a kindness for B, and that he had married his kinswoman, which made it in the nature of a marriage settlement. He likewise held that B could not have compelled A to redeem during his life; which made it the more strong. (a)

37. A, seised of a copyhold in fee, surrendered it upon his marriage to the use of himself and his wife, in special tail, remainder\* to her in fee, upon condition that if he \*74 paid £50 at a day certain to the daughter that the wife had, then the whole surrender should be void. The day elapsed, the £50 not paid, and the husband died without issue. On a bill to redeem brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration, without notice. It was resolved that this was not originally designed for a mortgage, but that the party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand. He had chosen the latter, and the plea was allowed. (b)

38. A *distinction* has been likewise made *between mortgages and defeasible conditional purchases*,\* subject to be repurchased within a time limited, where the interest is taken by way of rent-charge. For in the latter cases the stipulations made between

(a) *Bonham v. Newcomb*, 2 Vent. 364. 1 Ab. Eq. 312. (1 Vern. 7, 214, 232, S. C.)

(b) *King v. Bromley*, 2 Ab. Eq. 595.

the parties must be strictly adhered to, or else the estate of the grantee will become absolute.<sup>1</sup>

39. J. S. granted a rent-charge of £48 a year in fee to B, upon condition that if J. S. should at any time give notice to pay in the consideration money, being £800, by instalments, namely, £100 at the end of every six months, and should, pursuant to such notice, pay the same and interest, at any time during his life, then the grant to be void. There was no covenant for J. S. to pay the money; and the rent-charge was much less than what the interest came to. B had conveyed it over after J. S.'s death to a purchaser, with a collateral security for quiet enjoyment, and the purchaser had afterwards made a marriage settlement upon it. The question was, whether it was redeemable after sixty years. It was decreed by Lord Cowper that it was not. He observed,—It was material that, at the time of making the mortgage, interest was at 8 *per cent.*; the rent-charge, therefore, was much less than the interest of the money, consequently the payment of the rent-charge could not be taken as the payment of the interest. Several circumstances concurred in this case, which, though each of them singly might not be of force to bar

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<sup>1</sup> If it is doubtful whether the parties intended a conditional sale or a mortgage, Courts of Equity will regard it as a mortgage, such construction being the more just and equitable, and tending to prevent oppression. *Poindexter v. McCannon*, Dev. Eq. R. 373; *Skinner v. Miller*, 5 Lit. 84; *Secrest v. Turner*, 2 J. J. Marsh. 471; *Edrington v. Harper*, 3 J. J. Marsh. 354; *Crane v. Bonnell*, 1 Green, Ch. 264. And in order to ascertain the intention of the parties, Courts will look not only to the deeds and writings, but to all the circumstances of the contract; and for this purpose will receive parol evidence. *Robertson v. Campbell*, 2 Call, 421; *King v. Newman*, 2 Munf. 40; *Prince v. Bearden*, 1 A. K. Marsh. 170; *Oldham v. Halley*, 2 J. J. Marsh. 114; *Thompson v. Davenport*, 1 Wash. 125. [*Brant v. Robertson*, 16 Mis. (1 Bennett,) 129. Parol evidence cannot be received to change a written mortgage into a conditional sale. *Woods v. Wallace*, 22 Penn. (10 Harris,) 171.] Gross inadequacy of price is of itself sufficient evidence that a mortgage and not a conditional sale was intended. *Conway v. Alexander*, 7 Cranch, 218, 241; *Oldham v. Halley*, *supra*; *Vernon v. Bethell*, 2 Eden, 110. Where the debt, forming the consideration of the conveyance, still subsists, or the money is advanced by way of loan, with a personal liability on the part of the borrower to repay it, and, by the terms of the agreement, the land is to be reconveyed on payment of the money, it will be regarded as a mortgage; but where the relation of debtor and creditor is extinguished, or never existed, there, a similar agreement will be considered as merely a conditional sale. *Robinson v. Cropsey*, 2 Edw. 138; *Conway v. Alexander*, *supra*. And see the observations of Lord Redesdale, in *Verner v. Winstanley*, 2 Sch. & Lefr. 393; and of Mr. Justice Story, in *Flagg v. Mann*, 2 Sumn. 533, 534. See also 1 Pow. Mortg. 138 *a*, and note, (1,) by Mr. Rand; *Waters v. Randall*, 6 Met. 479, 482.



the redemption, yet, joined together, were strong to prevail over it. The mortgagee seemed to have allowed a consideration for purchasing the equity of redemption, after the death of the mortgagor,—1. By taking the rent of £48 *\*per annum*; \*75 2. By agreeing to have his money by instalments; 3. By leaving it only at the election of the mortgagor, whether he would redeem or not. There could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased. Length of time, where so great as in this case, was a good bar of redemption of a rent-charge, as well as of land; and the mortgagor was not bound to pay the money by any covenant. (a)

The reporter observes, that from the turn of Lord Cowper's argument, length of time seemed to be his principal objection to the redemption. But in the following case, decided by Lord Hardwicke, upon an appeal from the Rolls, the doctrine that such limited agreements for redemption, or rather repurchase, were legal, is confirmed.

40. A mortgage was made of an estate by the plaintiff's grandfather, Thomas Mellor, in 1689, to John and James Whitehead. Afterwards, on the 5th of June of the same year, the Whiteheads mortgaged the same estate to Cartwright and Haywood, and their heirs, for securing £200; to which Thomas Mellor and his son John were parties. Cartwright and Haywood, in order to secure themselves the interest, made a lease to the plaintiff's father and to his assigns, dated 12th June, 1689, for 5000 years, at the rate of £12 a year for the first three years, and £10 a year for the remainder of the term; and if in the space of three years the £200 was not paid with interest, then the premises were to be reconveyed. Receipts had been given, sometimes for interest, and sometimes for a rent-charge. The last receipt was in 1730. The £200 lent was money left under one Sutton's will in 1687, and directed to be laid out in the purchase of lands in fee in Lancashire or Cheshire; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate at the time of the mortgage was worth £500 only; but was then valued at £900. The plaintiff, on the 20th January, 1738, had given notice that he would pay in the money; but the defendant, a

new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. It was so decreed by Mr. Fortescue, Master of the Rolls. Upon an appeal to Lord Hardwicke, he said the bill was properly dismissed, not so much upon general rules, as upon the particular circumstances of the case, and the similitude of it to *Floyer v. Levington*. (a)

76 \*      \* 41. King James I., by his letters-patent under the great seal, granted divers lands to John King and John Bingley, and their assigns, for 116 years, at a certain yearly rent. The residue of this term became vested in John Tasburg. King Charles I., by letters-patent, granted the same premises to Sir Maurice Eustace and his heirs, at a like rent, but without reciting or taking any notice of the term of 116 years. Sir Maurice, by his will, devised the premises *inter alia* to his nephew, Sir John Eustace, in fee. The premises being only of the clear yearly value of £200, Sir John Eustace, in consideration of £200 paid him by John Tasburg, by lease and release, in May, 1681, conveyed the same to Charles Tasburg and his heirs, in trust for John Tasburg. In the release there was a proviso to the following effect, viz. that if Sir John Eustace, his heirs, executors, or administrators, should pay to Charles Tasburg, his executors, administrators, or assigns, at the end of five years, the sum of £200 with full interest for the same, at 10 *per cent.* according to the custom of Ireland, then it should be lawful to him and his heirs to reënter, and the same to repossess and enjoy as in his former right. But if Sir John, his heirs, executors, or administrators, should fail in payment of the money with interest, at the time limited, then the estate of the said Charles Tasburg should be absolute and indefeasible, as well in equity as in law; that Sir John, his heirs and assigns, should, on failure of payment, as aforesaid, be forever debarred from all right and relief in equity, against the tenor of the said release; and Sir John did thereby, for himself and his heirs, release unto Charles Tasburg, his heirs and assigns, forever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid. There was no covenant in the deed on the part of the grantor to repay the £200 or the interest thereof, as is usual in mortgages.

The five years mentioned in the proviso being elapsed, and no part of the £200 or the interest having been paid, John Tasburg,

(a) *Mellor v. Lees*, 2 Atk. 494.

having no remedy at law to compel the payment, the estate being only a reversion expectant upon the determination of a term, of which there were then forty-three years unexpired, exhibited a bill against Sir John Eustace in the Court of Chancery of Ireland, in the name of Charles Tasburg, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of Charles Tasburg in the \*pre- \*77 mises, in case it should be adjudged to be a defeasible or redeemable estate, should be made absolute to him and his heirs; in that case, that Sir John Eustace, might be foreclosed of all right or equity of redemption of the premises, and might make further absolute conveyances and assurances to the said Charles Tasburg, according to the tenor and true meaning of the indentures of lease and release. Sir John, being served with a subpoena to answer this bill, stood out all process of contempt to a sequestration; and never having put in his answer, a decree was made that he should be foreclosed, unless the principal, interest, and costs were paid on the 11th December, 1689. Sir John Eustace lived till the year 1706, when he died without issue; and never took any step to impeach the decree, or to seek redemption, but acquiesced under it for eighteen years. Henry Tasburg succeeded to this estate on the death of his father John in 1691, and entered thereupon; but the value of lands in Ireland having risen considerably, a bill was exhibited in the Court of Chancery there, in 1723, by the co-heirs of Sir John Eustace, alleging that the decree of foreclosure was obtained by surprise, fraud, and imposition; and praying it might be reversed. Henry Tasburg put in a plea and an answer to this bill, insisting on his title, pleading the lease and release in 1681, the decree of foreclosure, the great length of time, and acquiescence under the decree. It was *decreed*, that upon the plaintiffs paying the principal, interest, and costs due, they should recover the lands.

Upon an *appeal*, in 1733, to the House of Lords of England, it was insisted on behalf of Tasburg, that there ought to be no redemption upon any terms whatever, it being expressly agreed by the release, that if the money was not paid within five years, the estate should be irredeemable. It ought, therefore, to be considered as a conditional purchase, and the rather, because there was no covenant on the part of Sir John Eustace to pay the money; that as the appellant Tasburg, or those under whom he

claimed, could not compel payment, it ought not to have been decreed a mortgage; for in cases of mortgages the remedy should be reciprocal, consequently no equity of redemption could arise or spring from the condition contained in the release; for 78\* the supposed pledge was only a reversion expectant \* on a long term for years, whereof no less than forty-three were then to come, during which time it could yield no manner of fruit or profit; and, in reality, the £200 was more than sufficient consideration for the absolute purchase of the reversion, as lands were usually sold in Ireland at that time, and for near twenty years after: that the decree of 1688 ought to be binding on Sir John Eustace, and upon the respondents, as deriving under him; and ought not, at such a distance of time, to be impeached or altered.

On behalf of the respondents, it was said that the nature of the transaction, and the very deeds themselves, evidently showed that they were originally intended as a mortgage, not as a purchase. It was plain that John Tasburg understood them so to be, by bringing his bill of foreclosure. That courts of equity had, on all occasions, relieved against restraints imposed upon the equity of redemption; had admitted the mortgagor to redeem, notwithstanding the expiration of the time limited by the parties for that purpose; and had always considered clauses of this nature as terms extorted from the necessities of the borrower, tending to usury and oppression. Nor could any case be more proper for relief than this, where the redeemable interest did not commence in possession till 1724, and where the mortgagee was attempting to gain an estate of £900 *per annum* for so small a consideration as £200. The decree was reversed. (a) <sup>1</sup>

(a) *Tasburg v. Echlin*, 2 Bro. Par. Ca. 255. *Sevier v. Greenway*, 19 Ves. 413.

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<sup>1</sup> The general rule is well settled, that the mortgagee shall not be permitted to contract with the mortgagor at the time of the loan for an absolute purchase of the land, in case the money is not paid at the appointed time. *Supra*, § 25. But this case of *Tasburg v. Echlin* has been thought by some to justify an exception to this rule, where the payment of the money advanced and interest is limited to a particular period. See 1 Pow. on Mortg. 133. But Mr. Coote observes that this case was determined on circumstances so special that it is scarcely an authority for any subsequent case, and is hardly applicable to the point to which it has been adduced. Coote on Mortg. p. 30—33.

It has in one case been held, even under the general rule, that a deed of bargain and

42. A power may be given to a mortgagee, in case the money borrowed be not paid at the time stipulated, to sell the estate absolutely, which will be supported in equity.

43. A conveyance of lands was made by lease and release by A to B and his heirs; by a defeasance, bearing date with the release, it was agreed, that if A repaid £1000, &c., borrowed of B, and two other sums borrowed of other persons, which B had taken upon himself to pay off within a year, then B should reconvey to him: if he failed to pay the money within the year, then B should mortgage or absolutely sell the lands, free from redemption; and out of the money raised by such mortgage or sale, pay the said £1000, &c., with interest, and be accountable for the overplus to A and his heirs. The money not being paid at the time stipulated, B agreed to convey the estate for a certain sum of money. In the agreement, and also in the conveyance, \*an exception was made, in which the defeasance \*79 was mentioned. The Court said, the mortgagor might have redeemed at any time, while the estate continued in B; and though B had a power, on non-payment within the year, to mortgage or sell, in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what *he might have done*, but what he had done. It was evident that it was not B's intention to convey an absolute and indefeasible estate, for he had not conveyed it absolutely, and free from the equity of redemption, but had insisted upon having the defeasance inserted. (a)

It is clear, from the above statement, that the Court admitted the validity of the power of sale; and the same doctrine was fully assented to in the following case.

44. A mortgage of leaseholds was made to a trustee in 1798, with the usual power of redemption. It was agreed that, if default should be made in payment of the money, the trustee

(a) *Croft v. Powell*, Com. R. 603.

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sale, with a proviso avoiding it on the repayment of the purchase-money by the vendor is, *primâ facie*, and in the absence of any fraud, merely a conditional sale. *Fleming v. Sitton*, 1 Dev. & Bat. Eq. R. 621. But it is equally a well-known rule, that Courts of Equity lean strongly against contracts with liberty to repurchase, where the liberty thus secured is part of the original transaction; and will, if possible, bring them to be cases of redemption. *Longuet v. Scawen*, 1 Ves. 402, 406. And see *Flagg v. Mann*, 2 Sumn. 534.

might sell the estate, pay off the mortgage money, and give the residue to the mortgagor. Default was made in payment of the money. The trustee sold the estate by public auction. The purchaser required the concurrence of the mortgagor, who refused to join, insisting that the sale was made without his consent, and at an undervalue; upon which the purchaser filed a bill against the trustee and the mortgagor, who afterwards becoming a bankrupt, he filed a supplemental bill against his assignees. Upon the hearing of the cause, the Court dismissed the bill as against the mortgagor and his assignees, with costs; and decreed a specific performance against the trustee and his *cestui que trust*. (a) <sup>1</sup>

45. [Where a mortgage deed with a power of sale, provided that the surplus arising from such sale was to be paid to the mortgagor, his executors or administrators, it was in a late case decided that, if the estate had been sold *in the lifetime of the mortgagor*, the surplus moneys would have been personal estate; but the estate *not being sold at the mortgagor's death*, the equity of redemption descended to his *heir*, and that he *was entitled to the surplus* arising from the sale.] (b)

(a) *Clay v. Sharpe*, Lib. Reg. Mich. 1802, fo. 66. Sugd. on Vend. 6th.ed. App. XIV. Corder v. Morgan, 18 Ves. 344. Anon. 6 Mad. & Geld. 10.

(b) *Wright v. Rose*, 2 Sim. & Stu. 323.

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<sup>1</sup> The validity of a power to sell, vested in the mortgagee, was doubted by Lord Eldon, in *Roberts v. Bozon*, MSS. mentioned in 1 Pow. Mortg. 9, a, note by Mr. Rand; and various methods have been suggested, to effect the object of a speedy payment out of the proceeds of sale of the lands, without encountering the objections taken to the possession of such power by the mortgagee. *Ibid.* p. 9—13. But the validity of the power is now generally admitted, both in the United States and in England; it being subject to the control of Chancery, when about to be exercised in a manner oppressive to the debtor. *Matthie v. Edwards*, 2 Coll. C. C. 465; 10 Jur. 347; 11 Jur. 761; *Jones v. Matthie*, 11 Jur. 504. In *Virginia*, its validity has been denied; *Chewning v. Cox*, 1 Rand. 306; unless ratified by the mortgagor, subsequent to the sale. *Taylor v. Chewning*, 3 Leigh, 654. A sale under such power is final and conclusive, in favor of *bonâ fide* purchasers; and is a foreclosure and bar to the equity of redemption. *Jackson v. Henry*, 10 Johns. 185; *Carson v. Blakey*, 6 Missouri R. 273; *Eaton v. Whiting*, 3 Pick. 484, 491; *Kinsley v. Ames*, 2 Met. 29; *Waters v. Randall*, 6 Met. 483, 484. This power of sale is regulated by particular statutes in New York, and in several other States; see *post*, ch. 6, § 1, note; but the provisions, so far as the present point is regarded, are merely in affirmance of the common law. See *Doolittle v. Lewis*, 7 Johns. Ch. 50; *Demarest v. Wynkoop*, 3 Johns. Ch. 144—146; *Wilson v. Troup*, 7 Johns. Ch. 25, affirmed in 2 Cowen, 195.

The power in the mortgagee to sell, being coupled with an interest, is irrevocable,

and therefore may be executed even after the death of the mortgagor. *Bergen v. Bennett*, 1 Caines, Cas. in Er. 1. After a sale under such power, the interest of the mortgagor in possession is wholly divested, and he becomes a tenant at sufferance. *Kinsley v. Ames*, 2 Met. 29. See 4 Kent, Comm. 146, 147.

[A mortgage of a leasehold estate described by metes and bounds, is only an assignment of the rents, and the mortgage not conferring a power of sale, the annual rent only can be received by the mortgagee, and his debt may be enforced upon other securities in the mortgage. *Hulet v. Soullard*, 26 Vt. (3 Deane,) 295.]

## CHAP. II.

## SEVERAL INTERESTS OF THE MORTGAGOR AND MORTGAGEE.

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| <p>SECT. 1. <i>What is the Nature of the Mortgagor's Estate.</i></p> <p>4. <i>Cannot commit Waste.</i></p> <p>5. <i>Nor make Leases.</i></p> <p>9. <i>After Forfeiture has an Equity of Redemption.</i></p> <p>10. <i>The Mortgagee has the Legal Estate.</i></p> <p>12. <i>Entitled to Rent after Notice.</i></p> <p>14. <i>Subject to Covenants.</i></p> <p>15. <i>Cannot commit Waste.</i></p> <p>18. <i>Nor make Leases.</i></p> | <p>SECT. 20. <i>A Renewal of a Lease will be a Trust for the Mortgagor.</i></p> <p>21. <i>Must account for the Profits.</i></p> <p>30. <i>An Assignee only entitled to what is really due.</i></p> <p>32. <i>A Mortgage is Personal Estate.</i></p> <p>36. <i>Unless the Intention be otherwise.</i></p> <p>39. <i>But the Land must be re-conveyed.</i></p> |
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SECTION 1. Upon the execution of the conveyance by which a mortgage is created, *the legal estate of freehold and inheritance, or the legal estate for the term of years created by the mortgage, becomes immediately vested in the mortgagee.*<sup>1</sup> As, however, the actual possession of the lands is scarcely ever given to the mortgagee; but, on the contrary, a clause is usually inserted in the mortgage deed, that until default is made in payment of the mortgage money and the interest, the *mortgagor* shall retain the possession and receive the rents; he becomes, *in most respects, tenant at will*, to the mortgagee.<sup>2</sup> And it is said that where there

<sup>1</sup> Where the mortgage of a term contained the usual proviso of defeasance, on the payment of principal and interest at certain periods, with a power in the mortgagee to sell after three months' notice, in case of non-payment; the mortgagor covenanting to pay, and that the mortgagee, at any time after default, might enter and take the rents and profits for the residue of the term; it was held that the mortgagee might, by virtue of the deed, enter before default, and before any day named for payment. *Rogers v. Grazebrook*, 8 Ad. & El. 895, N. S. [In *Georgia*, a mortgage does not transfer the legal estate. It is an incumbrance or security for debt only. *Ragland v. The Justices*, 10 Geo. 65.]

<sup>2</sup> He is not strictly a tenant at will; for no rent is reserved; and so long as he pays the interest, he is not liable for rents and profits in the character of receiver. Nor is he entitled to emblements. Nor, to notice to quit. See, as to notice to quit, *ante*, tit. 9, ch. 1, § 17, note; 4 Kent, Comm. 155, 156; *Rockwell v. Bradley*, 2 Conn. R. 1; *Birch v. Wright*, 1 T. R. 383, per Buller, J.; *Fitchburg Man. Co. v. Melvin*, 15 Mass. 268; *Wilder v. Houghton*, 1 Pick. 87.



is a *proviso* that the *mortgagor* shall *continue in possession*, for the *number of years* given for repayment of the mortgage money, he will then be *tenant for years* to the mortgagee.† (a)<sup>1</sup>

(a) *Cholmondeley v. Clinton*, 2 Mer. 359. *Powseley v. Blackman*, Cro. Jac. 659.

[† In *Partridge v. Bere*, 8 Bar. & Ald. 604, and *Hall v. Surtees*, Ib. 616, it was held that a tenancy of some sort subsisted between the mortgagor in possession, and the mortgagee. In *Doe v. Maisey*, 8 Bar. & Cress. 767, Lord Tenterden observed, the mortgagor is not in the situation of a tenant at all, or at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser at the option of the mortgagee. In *Doe v. Giles*, 5 Bing. 431, it was decreed that where the mortgagor remained in possession, and the money was not repaid on the day stipulated, the mortgagee, who had a power of entry and sale on non-payment, might eject a mortgagor without notice to quit or demand of possession. See Stat. 3 & 4 Will. 4, c. 27, § 7.]

<sup>1</sup> The relations between the mortgagor and the mortgagee have been stated by Mr. Coote, as follows :—

“*First*. If in the mortgage deed there is the usual proviso for the enjoyment of the land by the mortgagor and his heir, until default in payment, &c., and the mortgagor is in actual possession, he may, under the agreement, be regarded as *tenant for years* to the mortgagee during the continuance of the agreement; and on his death during the agreement, it is considered that his legal interest might be considered as devolving on his *executors*, who, during the remainder of the agreement, might be regarded as trustees for the heir of the mortgagor. *Powseley v. Blackman*, Cro. Jac. 659.

“*Secondly*. If in the case of such agreement, the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement, without any fresh agreement between the parties, he is, until payment of interest, or other recognition of tenancy, tenant by sufferance, for he came in by a rightful title, although he holds over wrongfully.

“*Thirdly*. If the mortgage deed contains no such agreement, and the mortgagor remains the actual occupant with the consent of the mortgagee, he is strictly tenant at will. *Keech v. Hall*, 1 Dougl. 22.

“*Fourthly*. If, in the latter instance, the mortgage is transferred to another, without the concurrence of the mortgagor, the tenancy at will is determined, and the mortgagor becomes tenant by sufferance to the assignee until payment of interest or other recognition of tenancy; and in all cases in which the mortgagor can be considered tenant at will, the death either of himself or of the mortgagee must determine the tenancy. If it is determined by the death of the latter, the mortgagor will be tenant by sufferance to the representative of the mortgagee, until payment of interest or other recognition of tenancy, and afterwards tenant at will. If it is determined by the death of the mortgagor, and his heir or devisee enter and hold without any recognition of the mortgagee's title by payment of interest, or other act, an adverse possession may be considered to take place. *Smartle v. Williams*, 3 Lev. 387, and 1 Salk. 245; *Thunder v. Belcher*, 3 East, 449; per Holt, in *Smartle v. Williams*, 1 Salk. 245.

“*Fifthly*. In every case in which a tenancy by sufferance exists between the parties, and even where an adverse possession commences, as by the entry of the heir or devisee of the mortgagor without the consent of the mortgagee, the payment of interest is a recognition of the title of the mortgagee, and evidence of an agreement that the mort-

81 \*      \*2. It was formerly doubted whether an assignment by a mortgagee alone did not operate so as to make the mortgagor's continuing in possession, under the above clause, a disseisin, or divesting of the term, and turn it to a right; for if it did, the assignee could not assign it over, without making an entry, or

gagor, or person deriving title from him, shall hold at will, and a strict tenancy at will commences. *Holland v. Hatton*, Carth. 414; and 10 Vin. Ab. 418, pl. 19.

"Sixthly. If the land is in the occupation of tenants, and the mortgagee is permitted to receive the rents, he has been considered to be a receiver for the mortgagee, but, as hereafter explained, without liability to account. *Moss v. Gallimore*, 1 Dougl. 283. Yet, as to this, *vide Ex parte Wilson*, 2 Ves. & Bea. 252, in which Lord Eldon expressed his surprise at the mortgagor being considered as a receiver for the mortgagee, and attributed the doctrine to a misapplication of the principles of equity." See Coote on Mortg. 327—330.

The American doctrine, as now generally settled both at law and in equity, is, that as to all the world except the mortgagee, the freehold remains in the mortgagor, as it existed prior to the mortgage. Of course he retains all his civil rights and relations as a freeholder, and may maintain any action for an injury to his inheritance or possession, as before. He may also convey the legal estate to a third person, subject to the incumbrance of the mortgage. *Blaney v. Bearce*, 2 Greenl. 132; *Willington v. Gale*, 7 Mass. 138; *Simpson v. Ammons*, 1 Binn. 175; *Wilkins v. French*, 2 Applet. 111; *Upham v. Bradley*, 5 Shepl. 423; *Erskine v. Townsend*, 2 Mass. 493; *Hitchcock v. Harrington*, 6 Johns. 290, 295; *Punderson v. Brown*, 1 Day, 93, 96; *Waters v. Stewart*, 1 Caines, Cas. 47, 51, 66; *Clark v. Beach*, 6 Conn. 142; 4 Kent, Comm. 160; *Ford v. Philpot*, 5 H. & J. 312. And see 1 Smith's Leading Cases, [298] 401, note by Hare & Wallace; [*Coffing v. Taylor*, 16 Ill. 457. One mortgagor or his assignee of a subsisting mortgage, cannot maintain a real action against the mortgagee or his assignee. *Johnson v. Elliot*, 6 Foster, (N. H.) 67.]

After breach of the condition, or default of payment, it is clear that by the common law, the mortgagee may enter, or may eject the mortgagor by action. It is equally clear that, where it is *expressly agreed* that until default the mortgagor may remain in possession of the land, the mortgagee cannot enter before default; and that if he should, the mortgagor may have trespass against him. *Brown v. Cram*, 1 N. Hamp. 169; *Hartshorne v. Hubbard*, 2 N. Hamp. 453; *Runyan v. Mersereau*, 11 Johns. 534. Whether, in the absence of any express contract, such agreement may be implied from the fact alone of the mortgagor being suffered to remain in possession of the premises, or from that fact and a corresponding usage in the country, is not perfectly clear upon the authorities. As an inference of law, perhaps the Court might not presume it; but would leave the jury to find an agreement or license, if properly pleaded. See *Stowell v. Pike*, 2 Greenl. 387; *Brown v. Cram*, *supra*; *Hartshorne v. Hubbard*, *supra*. And *contra*, that the Court will presume it. *Jackson v. Hopkins*, 18 Johns. 488. But see 1 Smith's Leading Cases, 297.

But in the absence of any contract, express or implied, and of any statute provision, that the mortgagor may remain in possession, the mortgagee may enter, or eject the mortgagor by action, before default of payment, at his pleasure. *Newell v. Wright*, 3 Mass. 138; *Colman v. Packard*, 16 Mass. 39; *Reed v. Davis*, 4 Pick. 216; *Pettengill v. Evans*, 5 N. Hamp. 54; *Doe v. Cunard*, 2 Kerr, 193; [*Wales v. Mellen*, 1 Gray, 512. And after such entry, he may maintain trespass against the mortgagor who shall con-

obtaining the concurrence of the mortgagor. But it was held by Lord Holt that the mortgagor's continuing in possession would not have this effect. And Chief Justice Eyre said, that the covenant to suffer the mortgagor to continue in possession governed all the subsequent assignments. For that covenant being that the mortgagor should hold till default of payment, it created a tenancy at will upon all the mesne assignments. (a)

(a) *Smartle v. Williams*, 1 Salk. 245. 3 Lev. 387. Comb. 249.

tinue in possession of the premises thereafter. *Chellis v. Stearns*, 2 Foster, (N. H.) 312; *Furbush v. Goodwin*, 9 Ib. 321; *Page v. Robinson*, 10 Cush. 99; *Marsh v. Wentworth*; and *Marsh v. Horton*, cited in 10 Cush. 103; *Allen v. Bicknell*, 36 Maine, (1 Heath,) 436.

In a mortgage conditioned that the mortgagor shall maintain and support the mortgagee during life, and give him a decent burial, an agreement is implied that the mortgagee shall remain in possession until breach of the condition. *Wales v. Mellen*, 1 Gray, 512; *Brown v. Leach*, 35 Maine, (5 Red.) 39; *Norton v. Webb*, Ib. 218. The mortgagee out of possession cannot be considered as the proprietor of such mortgaged estate. *Norwich v. Hubbard*, 22 Conn. 587. Nor as an owner, except in a suit or proceedings to enforce his rights as mortgagee. *Great Falls Co. v. Worster*, 15 N. H. 412.]

And for the purpose of foreclosure, the mortgagee may have an action against any person in actual possession of the premises. *Keith v. Swan*, 11 Mass. 216; *Penniman v. Hollis*, 13 Mass. 429; *Fales v. Gibbs*, 5 Mason, R. 462. And see *Jackson v. Dubois*, 4 Johns. 216; *Den v. Stockton*, 7 Halst. 322. [And where tenants of the mortgagor and the mortgagee himself hold, in severalty, portions of the mortgaged premises, the mortgagee may recover a joint judgment for the rents and profits of the whole against them all, unless, they separate in their defence by a disclaimer. *Ayres v. Nelson*, 26 Vt. (3 Deane,) 13.]

If the mortgagee enters under a claim paramount or in opposition to the mortgage title, he cannot set up the mortgage as a defence to an action of trespass brought against him by the mortgagor. *Merithew v. Sisson*, 3 Kerr, 373.

In several of the United States, the right of possession of the premises before breach, is regulated by statutes. In *Massachusetts* and in *Maine*, it is enacted that the mortgagee may enter before breach, unless there is an agreement to the contrary. So it is in *Vermont*, provided the agreement is contained in the mortgage-deed. In *South Carolina*, the mortgagor, if he is in actual possession, is entitled to hold against the mortgagee, until the condition is broken. In *Indiana*, the Vermont rule is reversed, the mortgagee not being entitled to the possession before breach, unless it is expressly so covenanted in the deed. [This Indiana statute applies to mortgages executed before its passage. *Morgan v. Woodward*, 1 Carter, 446; Ib. 493.] See Mass. Rev. St. 1836, ch. 107, § 9; Maine Rev. St. 1840, ch. 125, § 2; Verm. Rev. St. 1839, ch. 35, § 12; LL. S. Car. Vol. V. p. 170; Ind. Rev. St. 1843, ch. 29, § 30. [In *Maryland*, unless there is an agreement to the contrary, the mortgagee is entitled to the possession of the property immediately upon the execution of the mortgage, without regard to whether there has been a breach or not. *Brown v. Stewart*, 1 Md. Ch. Decis. 87. If there is no affirmative covenant that the mortgagor shall continue in possession, with power to take the rents, profits, and issues, until default be made, he will not be regarded as the tenant of the mortgagee. *McKim v. Mason*, 3 Md. Ch. Decis. 186.]

3. The doctrine that the mortgagor is tenant at will to the mortgagee, has been discussed in some modern cases, in which it is shown that though some of the qualities of a tenancy at will subsist between a mortgagor and mortgagee, yet in others they differ. For it is now established that a mortgagee may, by ejectment, *without six months' notice*, recover against the mortgagor or his tenant; in which respect the estate of a mortgagor is inferior to that of a tenant at will. (a)<sup>1</sup>

4. A mortgagor in possession *cannot commit waste*;<sup>2</sup> if he does, the Court of Chancery will grant an injunction to restrain him; because it is neither just nor equitable that a mortgagor should in any way prejudice or diminish the value of the estate mortgaged. (b)

5. A mortgagor in possession *cannot make a lease to bind the mortgagee*: 1. Because, being only *quasi* tenant at will, a lease made by him would operate as a determination of his estate. 2. Because the mortgagor can do no act tending to diminish the security of the mortgagee. So that where a mortgagor makes a lease, the mortgagee may consider the lessee as a trespasser; and is not under the necessity of giving him six months' notice to quit. (c)<sup>3</sup>

(a) Doug. R. 279. 1 Term. Rep. 378—382. (Keech v. Hall, 1 Doug. 22.)

(b) 3 Atk. 723. 1 J. & W. 531. 8 Ves. 105. 5 Mad. 422. (Brady v. Waldron, 2 Johns. Ch. 148.) 2 Story, Eq. Jur. § 914. Eden on Injunctions, c. 9, p. 118, 119. 4 Kent, Comm. 161.)

(c) Tit. 9. (Ellithorp v. Dewing, 1 Chipm. 141.)

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<sup>1</sup> With respect to the right of a tenant at will to notice to quit, see *ante*, tit. 9, ch. 1, § 17, *note*. Whether the mortgagor is entitled to such notice from the mortgagee, is a point upon which the American authorities are not uniform. In *New York*, it has been held that he is entitled to notice. *Jackson v. Laughhead*, 2 Johns. 75; *Jackson v. Hopkins*, 18 Johns. 487. But in that State, by a subsequent statute, the mortgagee's remedy for possession is restricted to an action upon the special contract, if there were any, or to the statute remedy for foreclosure and sale, after default. *Rev. St. New York*, Vol. II. p. 408, § 58, 3d ed.; 4 Kent, Comm. 156, n. In other States, no such notice is necessary. *Groton v. Boxborough*, 6 Mass. 50; *Rockwell v. Bradley*, 2 Conn. 1; *Wakeman v. Banks*, *Ibid.* 445; *Fuller v. Wadsworth*, 2 Ired. 263. See also 9 S. & R. 311, per Duncan, J.; *Doe v. Cunard*, 2 Kerr, 193. [See also *Ing v. Cromwell*, 4 Md. Ch. Decis. 31.]

If the land is in possession by a tenant from year to year under the mortgagor, he will be entitled to notice to quit. *Birch v. Wright*, 7 T. R. 383.

<sup>2</sup> *Stowell v. Pike*, 2 Greenl. 387; *Smith v. Goodwin*, *Ib.* 176; [*Phoenix v. Clark*, 2 Halst. Ch. R. 447.]

<sup>3</sup> It is admitted, that if an authority can be implied in the mortgagor, from the mortgagee, to permit the cultivation, the same principle, by analogy, will justify an impli-

\* 6. An ejectment was brought for a warehouse in the city of London, by a mortgagee, against a lessee under a lease in writing, for seven years; made by the mortgagor, after the date of the mortgage. The lease was at rack-rent; the mortgagee had no notice of the lease, nor the lessee of the mortgage. Lord Mansfield said, the question for the Court to decide was, whether by the agreement understood between mortgagors and mortgagees—which was, that the latter should receive interest, and the former keep possession—the mortgagee had given an implied authority to let from year to year at a rack-rent; or whether he might not treat the defendant as a trespasser, disseisor, or wrongdoer. No case had been cited where the question had been agitated, much less decided. Where the lease was not a beneficial one, it was for the interest of the mortgagee to continue the tenant; and where it was, the tenant might put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question might be more proper for a court of equity, went upon a mistake. It emphatically belonged to a court of law, in opposition to a court of equity: for a lessee

cation that he had authority to demise. It is also admitted, that the mortgagee would be bound by the lease of the mortgagor, if he did any act amounting to an express or implied assent to it. 1 Pow. Mort. 163. But that the mortgagee may treat the lessee of the mortgagor as a trespasser, is a position which Chancellor Kent regards as unsound. He observes that “the justice and good sense of the case is, that the assignee of the mortgagor is no more a trespasser than the mortgagor himself; and the mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it is understood and held, that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for the rents; and the mortgagee must recover the possession by regular entry, by suit, before he can treat the mortgagor, or the person holding under him, as a trespasser. This is now the better, and the more intelligible American doctrine.” 4 Kent, Comm. 157. And more recently, in England, it was maintained by Lord Denman, that a mortgagee may so bind himself, by his own conduct, as to be precluded from treating the mortgagor’s lessee as a trespasser; and he intimated his opinion, that a jury might be warranted in inferring a recognition of the tenant’s right to hold, from the mere circumstance of the mortgagee’s knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them, exactly as if his property in them continued. See *Evans v. Elliot*, 9 Ad. & El. 342. In *Doe v. Hales*, 7 Bing. 322, it was held, that after demand of rent in arrear, by the mortgagee’s attorney, the tenant of the mortgagor could not be treated as a trespasser. And in *Evans v. Elliot*, *supra*, it was held by all the Judges, that the mortgagee could not, by a mere notice of the mortgage and a demand of rent, entitle himself to *distrain* upon the tenant of the mortgagor, without attornment, the lease having been made subsequent to the mortgage, and by the mortgagor then in possession.

at a rack-rent was a purchaser for a valuable consideration ; and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration the Court was clearly of opinion that there was no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It was rightly admitted, that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action : but here the question turned upon the agreement between the mortgagor and mortgagee. When the mortgagor was left in possession, the true inference to be drawn was an agreement that he should possess the premises at will, in the strictest sense, and therefore no notice was ever given him to quit ; and he was not even entitled to reap the crop, as other tenants at will were, because all was liable to the debt, on payment of which the mortgagee's title ceased. The mortgagor had no power, expressed or implied, to let leases, not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent—to leases where a fine was taken on a renewal for lives. The tenant stood exactly in the situation of the mortgagor. The possession of the mortgagor could not be considered as holding out a false appearance : it did not induce a  
 83 \* belief that \* there was no mortgage, for it was the nature of the transaction that the mortgagor should continue in possession. Whoever wanted to be secure when he took a lease, should inquire after and examine the title-deeds. In practice, indeed, especially in great estates, that was not often done, because the tenant relied on the honor of his landlord : but whenever one of two innocent persons must be a loser, the rule was, *qui prior in tempore potior est in jure*. If one must suffer, it was he who had not used due diligence in looking into the title. Judgment was given to the plaintiff. (a) <sup>1</sup>

(a) *Keech v. Hall*, 1 Dougl. 21.

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<sup>1</sup> In *Evans v. Elliot*, 9 Ad. & El. 342, Lord Denman said,—“I am by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out, exactly as if his property in them continued.

“The well-known case of *Keech, lessee of Warne, v. Hall*, 1 Dougl. 21, is generally considered as an authority the other way ; but Lord Mansfield was not there laying

7. In a subsequent case it was resolved that an ejectment might be brought by the assignee of a mortgagee, without giving notice to quit, against one who was let into possession as tenant from year to year, by the mortgagor, after the mortgage made to the original mortgagee, but before assignment of it to the plaintiff's lessor. (a)

8. It should, however, be observed that a lease of this kind is good against the mortgagor and his heirs, and also against all strangers; and will entitle the lessee to redeem the mortgage.

9. Where the money borrowed on a mortgage is not paid on the day specified in the deed, the mortgage is forfeited at law; and the estate of the mortgagor becomes an *equity of redemption*, of which an account will be given in the next chapter.

10. It has been stated that upon the execution of a mortgage deed, the *mortgagee* becomes *seised of the legal estate*; and may enter into possession, unless prevented by the express terms of the contract. But in equity, the lands mortgaged are considered as a pledge only in his hands for securing the repayment of the money borrowed. And as long as the right of redemption exists, the mortgagee is considered merely as a *trustee for the mortgagor*; so that none of his charges or incumbrances attach on the estate. (b)<sup>1</sup>

(a) *Thunder v. Belcher*, 8 East, 449.

(b) *Ante*, c. 1, § 10.

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down the law upon the subject so much as explaining his own view of the manner in which mortgagor and mortgagee commonly regard one another in fact. I must add that some misconception may have arisen on this subject, from the care the Courts have employed in correcting an acknowledged error of the same great Judge, the error of supposing that the right to recover in ejectment could depend on any thing but the legal right of possession. This most frequently follows the legal estate; though Lord Mansfield was disposed in some cases to transfer it to him in whom no more than an equitable title was vested. A strong assertion of the right of the mortgagee in such a case, against the mortgagor, may have led to the notion that, as against the former, not only the latter, but all claiming under him, must be wrongdoers, without adverting to the possibility of the right of possession being recognized in another by the person enjoying the legal estate." See 1 Smith's Leading Cases, [293,] with Hare & Wallace's notes, where all the cases on this point are reviewed.

<sup>1</sup> [Where one or more notes are given, secured by a mortgage of the maker, the mortgagee in possession holds the estate charged with the mortgage debt, in trust for the mortgagor. And the assignee in possession of the mortgage with one of the notes only, holds the estate in trust for the payment of all the notes it was intended to secure; and the mortgage is in itself notice to the assignee of the trust chargeable upon it, notwithstanding he may not know to whom the other notes have been assigned. *Moore v. Ware*, 38 Maine, (3 Heath,) 496; *Johnson v. Candage*, 31 Maine, (1 Red.) 28; *Keyes*

11. Where the interest is not paid, the mortgagee becomes entitled to the possession of the lands, and may bring an  
84 \* ejectment \* for the recovery of them. (a) †

12. The mortgagee may, upon non-payment of the interest, give notice of the mortgage to the tenants, or occupiers of the lands mortgaged; and he thereby acquires a right to the rents then in arrear, as well as to what accrues after.<sup>1</sup>

(a) Doe v. Roe, 4 Taunt. 887. 4 Ves. 106. 7 Ib. 489. 3 Ves. & B. 15. 13 Ib. 560. 9 Ves. 36. S. C. Coop. 27. 3 Mad. 433. 1 Bro. C. C. 514. Also Dixon v. Wigram, 2 Cr. & J. 613.

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v. Wood, 21 Vt. (6 Washb.) 331; Waterman v. Hunt, 2 R. Isl. 298; State Bank v. Tweedy, 8 Blackf. 447; McCormick v. Digby, 8 Blackf. 99.]

[† But by the Statute 7 Geo. 2, c. 20, it is enacted that where an ejectment is brought by a mortgagee, and no suit is then depending in equity respecting the foreclosure or redemption of the mortgage, the mortgagor's tendering the principal, interest, and costs in Court, shall be deemed a full satisfaction; and the Court may compel the mortgagee to reconvey the premises.]

<sup>1</sup> Formerly, in order to create a privity of estate between the purchaser of the reversion and the tenant of the grantor or lessee, so as to enable the former to maintain an action of debt for rent, the consent of the tenant to the alienation was necessary; and this consent was called *attornment*. For by the feudal law, neither the lord nor the tenant could alien their interests in the land to a stranger, without the other's consent. The necessity of such attornment was partly avoided by conveyances made under the Statute of Uses; and it was at last finally removed in England by the Statutes of 4 & 5 Ann. c. 16, and 11 Geo. 2, c. 19. The former of these statutes seems to have been tacitly adopted in the United States, as a rule in beneficial amendment of the common law. See 4 Kent, Comm. 490, 491; Burden v. Thayer, 3 Met. 78, per Shaw, C. J.; Commonwealth v. Leach, 1 Mass. 61, per Dana, C. J.; Farley v. Thompson, 15 Mass. 25, 26, per Wilde, J. And notice to the tenant is now deemed sufficient to entitle the grantee of the reversion to the subsequently accruing rent. For the rent is incident to the reversion, and constitutes, in case of a mortgage, part of the fund pledged for security of the debt. If, therefore, the mortgagee does not choose to enter, and receive the rents, the tenant is justified in making payments to his immediate lessor; but if the mortgagee elects to take the rents, he may give notice to the tenant of his election and title, and thereupon the tenant is *thenceforth* bound to pay the rent to him only. Ibid. And see Birch v. Wright, 1 T. R. 384, per Buller, J.

But where the mortgagor, being suffered to remain in possession of the land, makes a lease *subsequent* to the mortgage, it has been held that the mortgagee cannot, by mere notice to the lessee that the premises are mortgaged to him, and that default has been made in the payment, with a demand of rent from the lessee, cause the lessee to hold of him as his tenant, and *distrain* for the rent; unless the tenant attorned. Evans v. Elliot, 9 Ad. & El. 342. And see Alchorne v. Gomme, 2 Bing. 62; McKircher v. Hawley, 16 Johns. 288; Jones v. Clark, 20 Johns. 51; Sanders v. Vansickle, 3 Halst. 313, 316. The cases of Pope v. Biggs, 9 B. & C. 245, and Waddilove v. Barnett, 2 Bing. N. C. 538, seem *contra*; but in the former, which was debt for use and occupation, brought by the assignees of a bankrupt mortgagor against his own tenant, under a lease made *after* the mortgage, the question was, whether the defendant was protected



13. One Harrison, being seised in fee, demised certain lands, in 1772, to Moss, the plaintiff, for twenty years, reserving rent ; and afterwards mortgaged the same lands to the defendant, Gallimore, in fee. Moss continued in possession from the date of his lease ; and paid his rent regularly to the mortgagor, all but £28, which was due on or before November, 1778, when the mortgagee became a bankrupt, being at the time indebted to the mortgagee in more than that sum, for interest on the mortgage. On the 3d of January, 1779, the mortgagee gave notice to Moss, the tenant, of the mortgage, and demanded the rent then due, and afterwards entered and distrained for rent. The question was, whether the distress could be justified.

Lord Mansfield. " I think this case, in its consequences, very material. It is the case of lands let for years, and afterwards mortgaged ; and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor ; for the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years, the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb the possession, but only requires the rent to be paid him, and not to the mortgagor. This, however, is en-

by payments actually made to the mortgagee after notice and demand ; the Court deciding that he was protected ; and in the latter of these cases, which was assumpsit for use and occupation, brought by the mortgagor against his tenant, under a lease made *after* the mortgage, the question was, whether, under the new rules, notice by the mortgagee to pay the rent subsequently accruing to him only, was admissible under the general issue, and sufficient to bar the action ; and the Court held the affirmative. In both these cases, the defence implies an attornment. Whether the prior registration of the mortgage, under our registration laws, operating as previous notice to the lessee, of the mortgagor's title, would affect the principle of the decision in *Evans v. Elliot*, in its application here, *quære*.

If the tenant, under a lease made posterior to the mortgage, has become tenant to the mortgagee, by attornment and the payment of rent to him ; this will constitute a good defence to an action of ejectment, brought against him by the mortgagor. *Doe v. Simpson*, 3 Kerr, 194.

As to the rent which was already due and in arrear *at the time of the mortgage or grant* of the reversion, it is well settled that it does not pass to the mortgagee or grantee. See *Burden v. Thayer*, *supra* ; *Birch v. Wright*, *supra* ; *Fitchburg Man. Co. v. Melvin*, 15 Mass. 268 ; *Demarest v. Willard*, 8 Cow. 206. See also 1 *Smith's Leading Cases*, 425, 2d Am. ed. with *Hare & Wallace's* notes, where the American authorities are collected and reviewed.

tangled with difficulties. The question here is, whether the mortgagee was, or was not, entitled to the rent in arrear. Before the statute of Queen Anne, attornment was necessary, on the principle of notice to the tenant; but when it took place, it certainly had relation back to the grant; and, like other relative acts, they were to be taken together. Thus, livery of seisin, 85\* though made afterwards, relates to the time of the \*feoffment. Since the statute, the conveyance is complete without attornment: but there is a provision, that the tenant shall not be prejudiced by any act done by him as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and here the tenant has suffered no injury. No rent has been demanded, which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arms' length. In the case of executions, it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving the indemnity. As between the assignees and the mortgagee, let us see who is entitled to rent. The assignees stand exactly in the case of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only *quodam modo*. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee: but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent; and the tenant, in the present case, cannot be damnified, for the mortgagor can never oblige him to pay over again the rent which has been levied by distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor." (a)

14. It is a principle of law, that an *assignee of a lease* is sub-

ject to the performance of all the covenants contained in such lease. So that where a lease was assigned by way of mortgage, the mortgagee would become liable to the covenants in the lease, unless a *distinction* were made between an *absolute assignment* and one made by way of mortgage. Upon this ground it was determined by the Court of King's Bench in 1783, that if a leasehold was assigned as a security only for the repayment of a sum of money, the lessor could not sue the mortgagee, as assignee

\* of all the mortgagor's estate, even after the mortgage was \* 86 forfeited; unless the mortgagee had entered into possession.

But this doctrine has been altered; and it is now settled that when a party takes an assignment of a lease, by way of mortgage, the whole interest passes to him; and he becomes liable on the covenant for payment of rent, though he never occupied, or became possessed in fact. (a) †<sup>1</sup>

(a) *Eaton v. Jaques*, 1 Doug. 457. *Williams v. Bosanquet*, 1 Brod. & Bing. 238.

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[† To prevent the consequences of the mortgagee's liability as assignee, it is usual in practice to make mortgages of leaseholds by demise, and not by assignment, particularly if the property consist of buildings. Note by Mr. Cruise.]

<sup>1</sup> It is well settled, as a general doctrine, that a mere legal ownership does not make the party liable, in cases like those supposed in the text, without some evidence of his possession also, or of his actual agency. This principle is clearly recognized in the law of shipping; the rule being settled that the mortgagee of a ship does not incur the liabilities of an owner, until he takes possession, or actively interferes in the employment of the vessel. *Chinnery v. Blackburne*, 1 H. Bl. 117, n. *Jackson v. Vernon*, Ibid. 114; *Briggs v. Wilkinson*, 7 B. & C. 30; *Westerdell v. Dale*, 7 T. R. 306, per Lord Kenyon; *Brooks v. Bondsey*, 17 Pick. 441; *Colson v. Bonsey*, 6 Greenl. 474; *Winsor v. Cutts*, 7 Greenl. 261; *McIntyre v. Scott*, 8 Johns. 159. In *Young v. Brander*, 8 East, 10, the owner had transferred his interest, but not in legal form; yet the mere legal title, still remaining in him, was held not sufficient to render him liable, as owner, for repairs ordered by the captain.

It was the same general principle of equity and good sense, that was administered by Lord Mansfield, in the case of chattels real, in *Eaton v. Jaques*. And in the case of freehold estates, we have already seen that, as to all the world but the mortgagee, the mortgagor in possession is to be regarded as the sole owner of the land. See *ante*, § 1, note. The mortgagee is not treated as such, until after he has taken possession. *Lowell v. Shaw*, 3 Shepl. 242.

The assignee in mortgage of a chattel real, not in actual possession, is considered as possessed, only as against the assignor, and this by way of estoppel. He is not compelled to take possession; he may intend to acquire nothing more than an equitable lien, or a title by estoppel, and against purchasers with notice. His legal title in that case depends on a legal fiction; and fictions of law serve to effectuate the actual intent of the parties, but never to defeat it. Moreover, it is conceded, that if the mortgagee were to take an assignment of all the term except one day, he would not be liable on

15. Although a *mortgagee in fee in possession* has a right at law to commit any kind of *waste*, because he is there considered as the absolute owner of the inheritance; yet he will be *restrained in equity*; and the Court of Chancery will also decree an account to be taken of the trees cut down; and direct the produce to be applied, first in payment of the interest due on the mortgage, and then in reducing the principal. (a)

16. If, however, the *security is defective*, the Court of Chancery will not restrain a mortgagee from his legal privileges. But the money arising from the sale of timber must be applied towards payment of the mortgage. (b)

17. A mortgagee of a copyhold may pull down ruinous houses, and build better ones, to prevent a forfeiture. For the lord has a

(a) 2 Vern. 392. Salmon v. Claggett, 3 Bland, 126.

(b) Sel. Ca. in Chan. 80.

the covenants of the mortgagor, in the original lease; which shows that even the claim of his liability stands on ground purely technical; and so it was admitted in *Williams v. Bosanquet*, 1 Brod. & Bing. 238.

But it is clear that before entry the assignee cannot bring trespass; *Cook v. Harris*, 1 Lord Raym. 367; nor can the assignee of a lessee take by release, before entry, to enlarge his estate. Co. Lit. 46, b. Neither has a mortgagee, out of possession, any interest which can be sold on execution; *Jackson v. Willard*, 4 Johns. 41; but the equity of redemption, remaining in the mortgagor, is real estate, which may be extended or sold for his debts. *White v. Bond*, 16 Mass. 400; *Waters v. Stewart*, 1 Caines, Cas. 47; *Cushing v. Hurd*, 4 Pick. 253. Nor does the mortgagee derive any profit from the land, until actual entry, or other assertion of exclusive ownership; previous to which the mortgagor takes the rents and profits, without liability to account. *Ante*, § 1, note; *Fitchburg Man. Co. v. Melven*, 15 Mass. 268; *Gibson v. Farley*, 16 Mass. 280; *Boston Bank v. Reed*, 8 Pick. 459.

On these grounds, it has been held here, as the better opinion, that the mortgagee of a term of years, who has not taken possession, has not all the legal right, title, and interest of the mortgagor, and therefore is not to be treated as a complete assignee, so as to be chargeable on the real covenants of the assignor; and accordingly Courts have held that *Eaton v. Jaques* was rightly decided. *Astor v. Miller*, 2 Paige, 68; *Astor v. Hoyt*, 5 Wend. 603; *Walton v. Cronly*, 14 Wend. 63. In *New Hampshire*, it has been held otherwise. *McMurphy v. Minot*, 4 N. Hamp. 251. And in *Virginia* also, but partly on other grounds. *Farmer's Bank v. Mutual Ins. Soc.*, 4 Leigh, 69. The student will find a brief but searching review of *Williams v. Bosanquet*, in Mr. Coventry's note to 1 Pow. on Mortg. 182, a, note (M) at p. 185.

[The question whether the mortgagee of a term of years, who has not taken possession, is liable upon the real covenants of the assignor, is discussed at considerable length, and the English and American cases are reviewed by Mr. Justice Daniel in *Calvert et al. v. Bradley et al.* 16 How. U. S. pp. 593, 596, but no decision is made. The cases of *Stelle v. Carroll*, 12 Pet. 201; and *Van Ness v. Hyatt et al.* 13 Pet. 294, are commented upon and limited.]

right to say that the tenant shall not let the houses fall, and may seize if he does. (a)

18. A mortgagee in possession cannot make a lease of the lands, so as to bind the mortgagor, without an absolute necessity. For by that means the estate might be greatly injured, by the mortgagee's granting improper or beneficial leases.<sup>1</sup>

19. The plaintiff having mortgaged a house in London to Clay, the defendant, tendered him the principal sum due and interest, which he refusing, exhibited his bill to have a reconveyance. The defendant answered, that he had made a lease of the house for five years, reserving so much yearly rent, with a covenant, that after the expiration of the five years, the lessee should hold it for four years longer; and that if the plaintiff, the mortgagor, would grant such lease, the defendant would reconvey. The Master of the Rolls decreed for the defendant. On an appeal to Lord Macclesfield, it was insisted for the plaintiff, that a mortgagee could not make a lease of a house or lands in \*mortgage, unless there was an absolute necessity for it, \*87 which did not appear in this case. The Court, being of that opinion, reversed the decree.(b)†

(a) *Hardy v. Reeves*, 4 Ves. 480.

(b) *Hungerford v. Clay*, 9 Mod. 1. *Costigan v. Hastler*, 3 Sch. & Lef. 160.

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<sup>1</sup> [The deed of a mortgagee in possession of the mortgaged premises, will convey his rights under the mortgage. *Lamprey v. Nudd*, 9 Foster, (N. H.) 299, and will be good against all but the mortgagor and those who stand in his place, and will be good against them until redemption. *Hutchins v. Carleton*, 19 N. H. 487. But see *Furbush v. Goodwin*, 5 Foster, 425. A deed from the mortgagee to a third person of part of the land included in a mortgage, does not discharge that portion of the land from the mortgage as regards the mortgagor. *Wyman v. Hooper*, 2 Gray, 141. Where a prior mortgagee has taken possession for condition broken, and put in a tenant, a writ of entry will not lie by a second mortgagee against such tenant. *Batcheller v. Pratt*, 10 Cush. 185. If the mortgagee assigns one of several notes secured by a mortgage, such assignment is *pro tanto*, an assignment of the mortgage, and the assignee thereof, the other notes being paid, may have his action for foreclosure. *Page v. Pierce*, 6 Ib. 317. See also *Downer v. Button*, Ib. 338; *Fisher v. Otis*, 3 Chand. (Wisc.) 83; *Martineau v. McCollum*, 4 Ib. 153; *Whittemore v. Gibbs*, 4 Foster, (N. H.) 484; *Graham v. Newman*, 21 Ala. 497; 22 Ib. 743. But see *Warren v. Homestead*, 33 Maine, (3 Red.) 256. If a mortgage, made to secure the performance of a bond, be assigned, the assignee can maintain no action upon it, unless he has also some interest in the bond, for he can have no conditional judgment. *Webb v. Flanders*, 32 Maine, (2 Red.) 175.]

† [To the creation of a valid lease of an estate in mortgage, the concurrence of the mortgagee and mortgagor is essential. The mortgagee, having the legal estate, should demise, and the mortgagor also should demise and confirm. The rent may be reserved

20. Where a *mortgagee in possession of a lease* for lives or years *renews* it, he will be considered in equity as a *trustee for the mortgagor*; who will be entitled to such new lease, on payment of the money borrowed; because such renewal is supposed to be obtained in consequence of the possession of the original lease. But in a case of this kind the mortgagee will be allowed to add the fine paid for the renewal to his principal; and to receive interest for it. (a) <sup>1</sup>

21. Where a *mortgagee* is put into *possession of the lands*, or where he enters after forfeiture, he becomes a steward or bailiff to the mortgagor, and is therefore *subject to account* with him for the rents and profits of the estate.<sup>2</sup> He is not, however, obliged to account according to the value of the lands; that is, he is not bound by any proof the lands were worth so much, unless it can likewise be proved that he made so much of them, or might have done so, had it not been for his own wilful default; as if he turned out a sufficient tenant, who held it at so much rent, or refused to accept a sufficient tenant, who would have given so much for it. Because it is generally the laches of the mortgagor that he lets the lands go into the hands of the mortgagee,  
 88 \* by the non-payment of the money; therefore when the mortgagee enters, he is only accountable for what he ac-

(a) Tit. 12, c. 1. *Manlove v. Ball*, 2 Vern. 84.

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generally, and the covenants from the lessee should be made with the mortgagee, and not with the mortgagor severally. Sometimes a power is reserved in the mortgage for the mortgagor to appoint by way of demise, in which case the lease takes effect as an appointment of the use to the lessee for the term: in this instance the reservation may be general, and the covenants should be entered into with the mortgagee and also with the mortgagor severally, as where the lease operates as a common law demise.

If the mortgage is of leaseholds, of course the mortgagor cannot, under a power to lease in the mortgage deed, make an underlease of the legal estate without the concurrence of the mortgagee.]

<sup>1</sup> See *ante*, tit. 12, ch. 1, § 62, note; *Slee v. Manhattan Co.*, 1 Paige, 48.

<sup>2</sup> The mortgagee, in a Welsh mortgage, receives the rents and profits *in lieu* of interest; and therefore he is not, ordinarily, liable to account for them. See *ante*, ch. 1, § 19, note; Story on Bailm. § 233; 1 Pow. on Mortg. 373, a, and note (E.) by Coventry. [A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it. *Shaeffer v. Chambers*, 2 Halst. Ch. R. 548. A mortgagee of an undivided part of land, on entering into possession, is entitled to his share of the rents and profits, although his entry be made for the purpose of foreclosure, and be insufficient for that purpose. *Shepard v. Richards*, 2 Gray, 424.]

*tually receives*, and is not bound to take the trouble of making the most of another's property. (a) <sup>1</sup>

22. If the mortgagee proves that the estate was *let at a certain price*, while in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shows the contrary. (b) <sup>2</sup>

23. If a mortgagee enters upon the estate mortgaged, and thereby keeps out other creditors,<sup>3</sup> and yet allows the mortgagor to receive the rents and profits, he will be charged with all the profits which he might have made after entry. (c)

24. Where a mortgagee *permits the mortgagor* to make use of his incumbrance in *keeping out other creditors*, he will be subject

(a) 1 Vern. 45, 476. 2 Atk. 534. (*Gore v. Jenness*, 1 Applet. 53. 4 Kent, Comm. 165, 3 Pow. Mort. 946, *a*.)

(b) (*Blacklock v. Barnes*,) Sel. Ca. in Chan. 63. (3 Pow. on Mort. 949, *b*.)

(c) (*Copping v. Cooke*,) 1 Vern. 270.

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<sup>1</sup> See 4 Kent, Comm. 166. But if the profits are reduced or lost by the wilful default or gross negligence of the mortgagee, he is accountable for all that he might by due care and diligence have received. *Ibid.*; *Moore v. Aylett*, 1 Hen. & Munf. 29; *Saunders v. Frost*, 5 Pick. 259, 270; *Davenport v. Tarleton*, 1 Marsh. 244; 3 Pow. on Mortg. 949, *a*, note (E. 2), Rand's ed.; *Hughes v. Williams*, 12 Ves. 493; *Wragg v. Denham*, 2 Y. & Coll. 117; *Robertson v. Campbell*, 2 Call, 421. But a mortgagee is not accountable for rents and profits accruing from improvements made by himself, at his own expense. *Moore v. Cable*, 1 Johns. Ch. R. 385.

<sup>2</sup> If the mortgagee himself retains possession of the lands, he will be charged with the utmost value they would have produced, with ordinary care, exclusive of taxes and repairs; but if he enters into receipt of the rents, he will be accountable only after the rate of the rent reserved. *Trimleston v. Hamill*, 1 B. & Beat, 385; *Van Buren v. Olmstead*, 5 Paige, 9. And he is not chargeable, ordinarily, with interest on the rents received. *Breckenridge v. Brooks*, 2 A. K. Marsh. 239.

<sup>3</sup> Or, other incumbrancers, of whose liens he has notice. See 3 Pow. on Mortg. 949, *b*, by *Coventry*; *Ackland v. Gaisford*, 2 Madd. R. 28. The mortgagee in possession is not bound to engage in speculations and adventures for the benefit of the mortgagor, or of prior incumbrancers; nor is he to be entangled in minute inquiries whether some person would not have given more, which was never communicated. But if he speculates, he does so at his own hazard. *Hughes v. Williams*, 12 Ves. 493. But he is not accountable for profits prior to notice of the incumbrance; for, until then, the incumbrancer cannot be said to be injured. *Maddocks v. Wren*, 2 Ch. Rep. 109. The doctrine in the text however, does not apply to the case of a merely formal entry of the mortgagee, for the purpose of foreclosure, under the provisions of a State statute which permits that method of foreclosure by entry and subsequent lapse of time without redemption; although the mortgagor has been permitted to remain in possession; for the subsequent incumbrancer might enter, or redeem, and thus protect himself. But if the prior mortgagee should attempt to prevent the entry of the second, he would be held accountable to him for all the profits which he has thereby prevented him from receiving. *Charles v. Dunbar*, 4 Met. 498.

to account for the profits, from the time when the creditors were entitled to their remedy.<sup>1</sup>

25. A person made a mortgage of his estate, and afterwards became a bankrupt. The assignees brought an ejectment for the recovery of the lands comprised in the mortgage. The mortgagee refused to enter, but suffered the bankrupt to fence against the assignees, with this mortgage. The Lord Keeper said, the mortgagee should be charged with the profits from the time when the ejectment was delivered. (a)

26. If a mortgagee in possession *assigns over his mortgage*, without the assent of the mortgagor, he is bound to answer for the profits, both before and after the assignment; though assigned only for his own debt: for he is under a trust to answer the profits of the pledge; and it is a breach of trust to assign such pledge to an insolvent person. (b)

27. A mortgagee *will not be allowed any thing for his trouble* in receiving the rents of the estate himself: but if he is obliged to employ a *bailiff* or *agent*, he will be allowed what he has *paid to him*. And although there be a private agreement between the mortgagor and mortgagee, for an allowance to the mortgagee for his trouble in receiving the rents of the estate, yet the Court of Chancery will not carry it into execution; for they will not suffer him to receive more than his principal and interest. (c)<sup>2</sup>

(a) *Chapman v. Tanner*, 1 Vern. 267.

(b) 1 Ab. Eq. 328.

(c) 3 Atk. 518. 2 Atk. 120. 10 Ves. 405.

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<sup>1</sup> After judgment in ejectment brought by the mortgagee, he may be compelled to take possession, or to account as if he had taken it. *Buckingham v. Gay*, 1 Vern. 258; 3 Pow. on Mortg. 952, note.

<sup>2</sup> In the United States, the general practice seems in favor of allowing a reasonable compensation to mortgagees, as trustees of the mortgagor, for their care and trouble in managing and preserving the estate. See *ante*, tit. 12, ch. 4, § 43, note. In *New York* and *Kentucky*, the English rule has been adhered to. *Manning v. Manning*, 1 Johns. Ch. R. 534; *Breckenridge v. Brooks*, 2 A. K. Marsh. 239; 4 Kent, Comm. 166. The rule was reviewed in *Gibson v. Crehore*, 5 Pick. 161, by Wilde, J., in the following terms:—"With regard to the defendant's claim of compensation for his care and trouble in superintending the estate and receiving the rents, it seems to us reasonable; and we know of no good reason why it should be disallowed. In England, such an allowance is never made, unless where a bailiff has been employed. But the reason for adopting the rule there, as I understand it, does not apply here. In England, a trustee is never allowed any pecuniary compensation for his services in discharging the duties of his trust. And a mortgagee (as before foreclosure he holds the estate in trust for the mortgagor, if he chooses to redeem,) falls within the scope of that ancient rule. *Bonithon v. Hockmore*, 1 Vern. 316. I am aware that other reasons have been thrown out,



28. A mortgagee in possession will be entitled to such expenses as he is put to in keeping the estate *in necessary repair*, \* which he may add to the principal of his debt, \* 89 with interest; and if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may add this to the principal of his debt, and it shall carry interest. (a)<sup>1</sup>

(a) 3 Atk. 518.

but they appear to have little weight in them; and the true reason of the rule, as I take it, is the one assigned. In this Commonwealth, the English rule in regard to trustees, has never been adopted; on the contrary, claims of executors and other trustees under wills for compensation for their services in the trust, have been always allowed; and similar allowances have been made in *Virginia*, *Pennsylvania*, and other States. In *New York*, where the English practice has always been so closely followed, the English rule has been adopted. *Green v. Winter*, 1 Johns. Ch. R. 27; *Manning v. Manning*, Ibid. 527; *Wilson v. Wilson*, 3 Binney, 557; 4 Hen. & Munf. 415; *Granberry's Executor v. Granberry*, 1 Wash. 246.

"The justice of this rule has been called in question; we do not, however, reject it on that ground, but because our usages and practice are opposed to it; and to adopt it now, when trustees have accepted trusts under the expectation of compensation for their services, would be doing certainly gross injustice.

"We are, therefore, of opinion, that a reasonable sum ought to be allowed to the defendant for his care and trouble in receiving the rents and managing the estate; and we think five per cent. commissions on the rents received would be a reasonable compensation." [And the mortgagee will be allowed such further sum in addition to the five per cent. as may afford him a just and reasonable compensation for his services. *Adams v. Brown*, 7 Cush. 220.]

<sup>1</sup> Mr. Coventry has so well condensed the law on this subject, that no apology will be required for transferring his entire note to this place.—"It may be proper," he observes, "in this place to add, that the mortgagee in accounting will be allowed all costs of suit, taxes, renewal fines, sums expended for necessary repairs, and lasting improvements, or in performing the covenants of the mortgagor with third persons, as in carrying into effect a covenant to build; so he will be allowed all money expended in defence of the mortgagor's title, and all sums paid for copyhold admissions, heriots, or fines, with interest for the same respectively, after the rate of the principal, provided the Court doth not direct otherwise. *Degelder v. Depeister*, Finch, 207; *Elton v. Elton*, 3 Atk. 508; *Godfrey v. Watson*, Ib. 518; *Lomax v. Hyde*, 2 Vern. 185; *Manlove v. Bale*, 2 Vern. 84; 2 Bro. C. C. 653; *Lacon v. Mertins*, 3 Atk. 4; *Woolley v. Drag*, 2 Anstr. 551; *Lyster v. Dolland*, 1 Ves. Jun. 436; *Hardy v. Reeves*, 4 Ib. 482; *Quarrell v. Beckford*, 1 Madd. Rep. 281; *Sykes*, Ex parte, 1 Buck. B. C. 349; *Brightwen*, Ex parte, 1 Swan. 3. Where a mortgagee, thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he was allowed such expenditure, but he was directed to account for wilful spoils and wastes. *Thorne v. Newman*, Finch, 38. And as a general rule it may be laid down, that where a mortgagee in possession, finds it absolutely necessary for the protection of the estate, to incur extraordinary expenses, he will be allowed them; particularly if in accounts regularly furnished by him for the satisfaction of the mortgagor, the latter doth not from time to time object to the extraordinary charges; for they are then to be considered as incurred

29. It is a rule of the Court of Chancery, in directing an account between a mortgagor and mortgagee, that wherever the

and paid with the mortgagor's approbation; but without the mortgagor's acquiescence, Lord Manners, in a recent case said, he should have felt considerable difficulty in allowing charges for preservation of the property; for that even in the case of absolute necessity, it was incumbent on the mortgagee to apprise the mortgagor, as soon as possible, of the extraordinary expenditure. *Trimleston v. Hamill*, 1 Ball & Bea. 385. It should be added, that a mortgagee will not be bound to keep up buildings in as good repair as he found them, if the length of time will account for their being dilapidated. *Russell v. Smithers*, 1 Anstr. 96; and a mortgagee in possession of mines, is not bound to spend more in working them than a prudent owner would do. *Rowe v. Wood*, 2 Jac. & Walk. 553.

"In estimating lasting *improvements*, old buildings pulled down, if incapable of repair, are to be valued as old materials only. *Robinson v. Ridley*, 6 Madd. 2. Lands were limited by marriage settlement upon failure of issue male, to daughters and their heirs, until the next remainder-man should pay them £3000; there being no sons, and four daughters, they entered. The Master of the Rolls decreed that they should account for the profits, and that the rents should be applied, first to pay the interest, and then to sink the principal, as in the case of a common mortgage, which decree was affirmed by the Lord Chancellor, with this variation, that the principal should not be sunk till a third part was raised above the interest, and so again, when another third part was raised. *Blagrove v. Clunn*, 2 Vern. 523, 576.

"It seems that money laid out by a mortgagee in *repairs* and beneficial improvements, form a lien on the land, *ante*, 671; but in ordinary cases, money laid out in improving premises does not create a lien; yet if a party, *conceiving himself to be owner*, makes lasting improvements, a Court of Equity, it is assumed, would not take the estate from him without compelling the plaintiff to make some allowance for the sum expended in improving his premises. *Swan v. Swan*, 8 Price, 518.

"In ascertaining what was due on the mortgage of a house and the appurtenances to a mortgagee who had taken possession, the Master had allowed him the costs of some improvements which he had made. The building being in a very dilapidated condition, he had rebuilt the kitchen, pantry, &c.; and he had the house double roofed, instead of being as it was before, only single roofed. The mortgagee had been charged with an occupation rent; and that rent had been estimated with reference to the increased value of the premises caused by the new erections.

"The mortgagor excepted to the report, on the ground that he ought not to be charged with the sums expended on the premises by the mortgagee. For the exception it was contended, that a mortgagee had no right to increase the amount of the charge on the property by expending money upon it without the sanction of the mortgagor. If the property began to fall into a state of dilapidation, which was likely to diminish its value so much that it would not be an adequate security for his money, his remedy was by foreclosure, and not by laying out money in what the mortgagee might conceive to be repairs or improvements, but which the mortgagor might not choose to have made. For the report, it was urged that the improvements appeared by the finding of the Master to have been substantial and proper, and a mortgagee was justified in acting as a provident owner would have done. Nothing would be more injurious to mortgagors than that a mortgagee should be unable, with safety to himself, to expend money in maintaining the premises in good repair. The Vice-Chancellor:—This mortgagee has not made new buildings for new purposes; he has only erected new buildings on the site of the old, and for the same purposes as were served by them. The new

gross sum received exceeds the interest, it shall be applied to sink the principal. "But this (says Lord Hardwicke) is often

buildings are merely substitutions for those which were too ruinous to be any longer useful. This exception must be overruled. *Marshall v. Cave*, MSS. Mich. 1824, Chanc.

"The Master had charged the mortgagee with an occupation rent, not from the time when he recovered possession of the premises, but only from the time when the repairs had been completed.

"An exception was taken to the report, on the ground that the occupation rent ought to have been calculated from the date when the mortgagee entered into possession. The mortgagor, it was said, was here charged with interest during a time when the mortgagee was in possession of the property, and yet was charged with no rent. Was the mortgagee to be allowed, first to occupy the premises *gratis*, and then to charge interest? On the other hand, it was answered that the finding of the Master showed that, at the time when the mortgagee recovered possession, the premises were in so ruinous a state, that no rent could have been gotten for them; and a mortgagee could not be charged with rent for that which appeared to be, in truth, of no annual value. The Vice-Chancellor was of this opinion, and overruled the exception. S. C.

"By the Roman law, if a mortgagee had been at any necessary charges for the preservation of the pledge, whether he was in possession of it or not, the debtor was bound to reimburse him, although the thing were no longer in being, as if a house repaired by the mortgagee had been carried away by a flood, or burnt down, without his fault; and if the pledge were still existing, and in the custody of the mortgagee, he was allowed to detain it for expenses of this kind; for they were considered as augmenting the debt, and as forming a part of it." See 3 Pow. on Mortg. 956, note (q,) Rand's ed.

It thus appears that the expense of substituting new buildings for old, where the old buildings were so dilapidated as to be past any beneficial repair, is a fair charge in favor of the mortgagee. It falls under the head of necessary and prudent repairs, which he may and ought always to make, and beyond which he is not ordinarily permitted to go. *Russell v. Blake*, 2 Pick. 505. And see *Saunders v. Frost*, 5 Pick. 259. The expense of insurance against fire is not a charge on the premises mortgaged, unless by agreement with the mortgagor or owner. Neither is the cost of making an aqueduct, unless it appears that without it the premises could not have been supplied with water. *Saunders v. Frost*, *supra*. [And if the mortgagee, without any agreement between himself and the mortgagor, gets his interest insured, and receives the amount of insurance under his policy, it does not affect his claim against the mortgagor. The two claims are wholly distinct and independent. *White v. Brown*, 2 Cush. 412—417.] Nor will the mortgagee be allowed the cost of improvements made by the clearing of wild lands; *Moore v. Cable*, 1 Johns. Ch. R. 385; nor for any other improvements, made without the consent of the mortgagor. *Quinn v. Brittain*, 1 Hoffm. 353; *Sandon v. Hooper*, 6 Beav. 246. But he will be allowed for all taxes paid by him; *Faure v. Winans*, 1 Hopk. Ch. R. 283; and for all expenses, properly incurred for the recovery of the mortgage-money; *Ellison v. Wright*, 3 Russ. 458; or in supporting the title of the mortgagor, when impeached; *Godfrey v. Watson*, 3 Atk. 517; or otherwise necessarily incurred in the defence, redemption, relief, and protection of the estate, and in reparation of the premises. *Hagthorp v. Hook*, 1 G. & J. 273; *Page v. Foster*, 7 N. Hamp. 392; *Burrowes v. Mulloy*, 2 Jones & Lat. 521; *Sandon v. Hooper*, 6 Beav. 246; *Neale v. Hagthorp*, 3 Bland, 551. [Miller v. Whittier, 36 Maine, (1 Heath,) 577;

attended with great hardships to the mortgagees, where, as in this case, the sum was large; £4000 principal, and the mortgagee forced to enter upon the estate, and could only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to account; and, therefore, truly said the Master, he is not obliged, for every trifling small exceed of interest, to apply it to sink the principal; nor do I know that the Court has ever laid it down as an invariable rule, that the Master must always, in taking such accounts, make *annual rests*." (a)<sup>1</sup>

(a) 2 Atk. 534.

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Riddle v. Bowman, 7 Foster, (N. H.) 236; McCumber v. Gilman, 15 Ill. 381.] See further, as to the mode of stating the account, Whittick v. Kane, 1 Paige, 202; Allen v. Clarke, 17 Pick. 47; Tucker v. Buffum, 16 Pick. 46.

But in regard to allowing the mortgagee for moneys expended in performing the mortgagor's covenant with third persons *to build*, it may be doubted whether the courts would now administer the rule as broadly as it is laid down by Mr. Coventry, in the beginning of this note; since it has recently been decided that a covenant to build houses does not run with the land. Doughty v. Bowman, 12 Jur. 182. Yet in Hardy v. Reeves, 4 Ves. 482, the Master was directed to take an account of moneys expended by the mortgagee in the erection of new buildings, under the circumstances of that case; lb. 471, 472; and covenants *to rebuild* are admitted to run with the land. See Thomas v. Von Kapff, 6 G. & J. 372; Harris v. Coulbourn, 3 Harringt. 338; Vernon v. Smith, 5 B. & Ad. 1, per Best, J. So, of covenants *not to build*. See Norman v. Wells, 17 Wend. 136; Watertown v. Cowen, 4 Paige, 510.

Though the mortgagee *may* discharge prior incumbrances, he is *not obliged* so to do. Marine Bank v. Biays, 4 H. & J. 343.

The rule refusing the allowance of lasting improvements in building, has been subjected to some exceptions in special cases; one of which is mentioned by Lord Hardwicke in Godfrey v. Watson, above cited; and others have been admitted under the equity arising out of the circumstances of the several cases. See Conway v. Alexander, 7 Cranch, 218; Ford v. Philpot, 5 H. & J. 312; 4 Kent, Comm. 167; Dougherty v. McColgan, 6 G. & J. 275. [McCumber v. Gilman, 15 Ill. 381. Where the holder of the equity sees, in silence, the purchaser in good faith making improvements on the premises, he must, when he redeems, pay for the improvements, less the rents and profits. Bradley v. Snider, 14 Ill. 263; Boston Iron Co. v. King, 2 Cush. 400.]

In some of the United States, the heads of allowance to the mortgagee, upon redemption of the premises, are specially enumerated in the statutes. Thus, in *Maine* and *Massachusetts*, he is to be allowed for reasonable repairs and improvements, and for all taxes lawfully assessed, and for all other necessary expenses. See *Maine* Rev. St. 1840, ch. 125, § 16; *Mass. Rev. St.* 1836, ch. 107, § 15. In *Rhode Island*, he is to be allowed for repairs, insurance, improvements, and other necessary expenses. *R. Isl. Rev. St.* 1844, p. 198. In *New Jersey*, no allowance is made to him for his trouble, nor for improvements; but he is allowed for all taxes paid, and for necessary repairs. *Elm. Dig.* p. 347, n.

<sup>1</sup> Annual rests are not to be made by the Master, unless he is specifically so ordered by the decree. *Webber v. Hunt*, 1 Madd. R. 13; 3 Power on Mortg. 957, note (T)

30. A mortgagee, either before or after he enters into possession, may assign over his mortgage. But, in all such cases, the assignee is only entitled to what is really due on the mortgage at the time of the assignment; not to what may appear due on the face of the mortgage. It is, therefore, the universal practice to make the mortgagor a party to the assignment; for otherwise it may happen that the mortgagee, having received a part of the money, may assign the mortgage, in consideration of the whole sum for which it was originally made; in which case the assignee would be defrauded; as he could only oblige the mortgagor to pay him what remained due. (a)<sup>1</sup>

31. It was held in a subsequent case, that even after an assignment of a mortgage, payments to the mortgagee, without notice, must be allowed by the assignee; though the assignment of the mortgage (the lands being in Middlesex) was registered. (b)

32. Although the mortgagee enters into possession, yet as long as the right of redemption exists, the mortgage is only considered as personal estate; the debt being the principal, and the

(a) Mathews v. Walwyn, 4 Ves. 118. (Jackson v. Campbell, 5 Wend. 572.)

(b) Williams v. Sorrell, 4 Ves. 389.

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by Coventry. The general rule is, to charge the mortgagee with interest,—1. Where the mortgage is satisfied, and a considerable balance remains in his hands;—2. Where he refuses to account;—3. Where he has notice of a subsequent mortgage, to pay which he is requested to apply the balance in his hands. Archdeacon v. Bowes, 13 Price, 353; Wilson v. Metcalf, 1 Russ. 530. In other cases, the rule is as stated by Sir Samuel Romilly, and agreed to by Sir Wm. Grant, M. R., in Davis v. May, 1 Coop. Ch. Cas. 238; namely, to cast the debt and interest, on the one hand, and the total amount of rents, without interest, on the other hand, and deduct the one from the other.

In general, the Courts do not direct annual rests to be made in the account. The rule is to cast the running interest only; leaving it to the mortgagor to show a case forming an exception to this rule. The most common exceptions, in which annual rests are made, are, where there was no interest in arrear when the mortgagee took possession; Shephard v. Elliott, 4 Madd. R. 254; and where the rents considerably exceed the interest. Gould v. Tancred, 2 Atk. 533; Reed v. Reed, 10 Pick. 398. Where, in the latter case, the interest on the mortgage debt was payable semiannually, the Court directed semiannual rests to be made. Gibson v. Crehore, 5 Pick. 146. And see Wilson v. Cluer, 3 Beav. 136; Binnington v. Harwood, 1 Turn. & Russ. 477; Van Vronker v. Eastman, 7 Met. 157; Post, ch. 4, § 73; Horlock v. Smith, 1 Colly. N. C. 287. [Boston Iron Co. v. King, 2 Cush. 400.]

<sup>1</sup> Where the mortgagor is a party to the assignment, the sum paid by the assignee, though including interest then due, constitutes a new capital, on which interest is to be computed. See post, ch. 4, § 65.

land the accessory. And if the mortgagor does not redeem, the personal representatives of the mortgagee will be entitled to the land. (a)

90 \* \* 33. A mortgage was forfeited, the heir of the mortgagee was in possession, and no want of assets: but as the mortgage money was part of the personal estate, the heir was decreed to convey the lands to the administrator of the mortgagee. (b)

34. In a modern case it was resolved, that lands, held originally under old mortgages, passed by a general devise, though no release of the equity of redemption appeared; and that there was no equity between the heir or devisee and the personal representative, to convert property from the state in which it is found at the death of the testator. (c)

35. If, however, it appear to have been the *intention of the mortgagee that it should not go as personal estate*, the personal representatives will not be entitled to it.

36. A testator having a mortgage in fee, devised it to his two daughters and their heirs. One of the daughters dying without issue, her husband and administrator claimed a moiety of the lands, as part of his wife's personal estate; it being a mortgage not foreclosed, nor the equity of redemption released. The Court said, that although it was a mortgage as between the mortgagor and mortgagee, yet it being the testator's intention that it should pass as real estate, it must go to the deceased daughter's heir at law. (d)

37. Mr. Garret being indebted to his brother, devised to him a mortgage for a larger sum, for which he had got a decree of foreclosure, but died before the account was taken, or the mortgagor absolutely foreclosed. Lord King declared that the lands in mortgage, being devised as real estate, should be considered as such, between the devisor and devisee; therefore, though the legacy was greater than the debt, it should not go in satisfaction of it, but if assets fell short, it was still to be considered as personal estate, for the payment of debts. (e)

38. It is said by Lord Mansfield, that "a mortgage is a charge upon land; and whatever would give the money will carry the

(a) Treat. of Eq. B. 3, c. 1, § 13.

(c) Att.-Gen. v. Bowyer, 5 Ves. 300.

(e) Garret v. Evers, Mos. Rep. 364.

(b) Ellis v. Guavas, 2 Chan. Ca. 50.

(d) Noys v. Mordaunt, 2 Vern. 581.

estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the Statute \* of Frauds. The assignment of the debt, or for- \* 91 giving it, will draw the land after it, though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the Statute of Frauds." (a)

39. This passage can only mean that mortgages are so far out of the Statute of Frauds, at the *payment of the debt converts the mortgagee into a trustee for the mortgagor*; who, by an application to the Court of Chancery, may obtain a decree to compel the mortgagee to reconvey, or assign the lands by proper assurances; not that the payment of the money shall, of itself, have the effect of restoring the legal estate to the mortgagor, without any conveyance. (b)<sup>1</sup>

(a) *Martin v. Mowlin*, 2 Burr. 978.

(b) (*Ante*, c. 1, § 14. *Post*, c. 4, § 81, note.)

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<sup>1</sup> In the United States, the doctrine supposed to be most prevalent is, that by payment of the debt by the mortgagor, the estate of the mortgagee is annihilated. This is universally agreed to be the case, where the mortgagor has remained in possession of the land, and the debt is paid before condition broken. If payment has been made, though after breach, it is a good defence to an action at law, by the mortgagee, to recover possession; at least in those States where, before a writ of *habere facias* can be issued, the amount due on the mortgage is first to be ascertained, and a day allowed to the mortgagor to pay it; and such provision, in substance, though in various forms in practice, exists in many of the States. For, as was observed by Story, J., "unless the mortgagor can resist a recovery by the mortgagee at law, he may be turned out of possession, when nothing is due on the mortgage, against the plainest principles of justice, and be driven by a circuitry of action to enforce his acknowledged rights. If a cent only be due on the mortgage, the mortgagee can obtain no judgment at law in his suit, but a conditional one, and no possession at all if that cent is paid; and yet, if nothing is due, his rights are absolute, and he is entitled to an unconditional surrender of the possession. I confess," added he, "I do not understand the reasoning upon which such a distinction can be maintained." 3 Mason, R. 527. Such was held to be the law in *Maine*, in *Gray v. Wass*, 1 Greenl. 257, 261, and *Vose v. Handy*, 2 Greenl. 322, 332, 333, approved in *Gray v. Jenks*, 5 Mason, R. 520; see also *Crosby v. Chase*, 5 Shepl. 369; [*Furbush v. Goodwin*, 5 Foster, (N. H.) 425. Where a deed absolute on its face was decreed to be a mortgage, and the mortgage was paid, the Court in equity ordered the grantor and grantee to release the estate to the person equitably entitled to it, with covenants of warranty against all persons claiming under them or either of them. *Howe v. Russell*, 36 Maine, (1. Heath,) 115; *Carter v. Walker*, 2 Ohio, N. S. 339.] And such is now held to be the law in *Massachusetts*. *Wade v. Howard*, 11 Pick. 289. The law is held in the same manner, on general grounds, irrespective of positive statutes, in *Maryland*; *Morgan v. Davis*, 2 Har. & McHen. 17; *Paxon v. Paul*,

40. In the case of a mortgage in fee, the proviso in all modern deeds is, that upon payment of the money at the time specified, the mortgagor shall *reconvey the estate*. Now, in *this* case, even a strict performance of the condition will not operate so as to

3 Har. & McHen. 399; and in *New York*, *Jackson v. Davis*, 18 Johns. 7, 12; *Jackson v. Blodget*, 5 Cowen, 202; *Rosevelt v. Stackhouse*, 1 Cowen, 122; *Arnot v. Post*, 6 Hill, 65; *Jackson v. Crafts*, 18 Johns. 110. So, in *New Jersey*; *Denn v. Spinning*, 1 Halst. 471; *Harrison v. Eldridge*, 2 Halst. 407; *Van Meter v. Van Meter*, 3 Am. Law Journ. 152, N. S. And in *Vermont*; *Harvey v. Hurlburt*, 3 Verm. 561, *semble*; *Barnes v. Beach*, 3 Washb. 146; *Burton v. Austin*, 4 Verm. 105. And in *Pennsylvania*; *Kinley v. Hall*, 4 W. & S. 426; *Hodgdon v. Naglee*, 5 W. & S. 217. And in *Ohio*; *Perkins v. Dibble*, 10 Ohio R. 433; *Walk. Intr.* p. 304, 305. [See also *Mason v. Hearne*, 1 Busbee, Eq. (N. C.) 88.] But it is held otherwise in *Connecticut*; *Sage v. Phelps*, 2 Day, 151; *Doton v. Russell*, 17 Conn. R. 146; and in *Kentucky*; *Breckenridge v. Brooks*, 2 Marsh. 337; *Breckenridge v. Ormsby*, 1 Marsh. 257; and in *Virginia*; *Faulkner v. Brockenbrough*, 2 Rand. 225; 1 Lomax, Dig. 335, 336.

In *New Hampshire*, the same doctrine has been held, as in *Maine*; but it was placed by the Court mainly upon the language of the statute, which declared that upon payment or tender thereof within a time limited in the statute, the deed should be utterly void. *Swett v. Horn*, 1 N. Hamp. 332; and see *Willard v. Harvey*, 5 N. Hamp. 252; [Heath v. West, 6 Foster, N. H. 191.] For the law of payment and tender, see 2 Greenl. on Evid. tit. Payment, § 516—536; *Ibid.* tit. Tender, § 600—611, a.

In several of the States, provision is made by statutes for the discharge of mortgages by the entry of satisfaction in the margin of the registry. See *Massachusetts*, Rev. St. 1836, ch. 59, § 33, 34; *Maine*, Rev. St. 1840, ch. 125, § 28; *New Hampshire*, Rev. St. 1842, ch. 131, § 5, 6; *Vermont*, Rev. St. 1839, ch. 60, § 29—31; *Rhode Island*, Rev. St. 1844, p. 260; *New York*, Rev. St. Vol. II. p. 45, 3d ed.; *Elm. Dig. LL.* *New Jersey*, p. 86, LL. *Pennsylvania*, by Dunlop, p. 35; *Delaware*, Rev. St. 1829, p. 92; *Michigan*, Rev. St. 1837, p. 261; Stat. 1839, No. 115, § 13, p. 219; *Ohio*, Rev. St. 1841, p. 270; *Indiana*, Rev. St. 1843, ch. 29, § 69, 70; *Illinois*, Rev. St. 1839, p. 155, 156; *Missouri*, Rev. St. 1845, ch. 122; *Mississippi*, Rev. St. 1840, ch. 34, § 33, 34; *Alabama*, Toulm. Dig. p. 238; *Arkansas*, Rev. St. 1837, p. 580.

In *Massachusetts*, *Vermont*, *Rhode Island*, *Pennsylvania*, *Delaware*, *Michigan*, and *Missouri*, the neglect or refusal of the mortgagee to make such discharge, upon request, renders him liable to an action for whatever damages the mortgagor may sustain therefrom. In *Illinois*, *Mississippi*, *Alabama*, and *Arkansas*, a similar liability is enacted; but the damages are limited, not to exceed the amount of the mortgage money. In the other States, where this mode of discharge is provided, it seems left at the option of the parties, and, therefore, no action is given by statute for refusal.

Upon this provision, an argument was raised, in the case of *Gray v. Jenks*, before cited, in favor of the existence of a legal estate in the mortgagee, after payment; on the ground that a release was thus recognized as essential to restore the title to the mortgagor. "But the whole argument," said Mr. Justice Story, "giving it its full latitude, falls far short of the cogency which is attributed to it. In respect to the statute action on the case, it lies only for such damages as may arise from the refusal to discharge the mortgage after satisfaction; but it does not necessarily sup-



revest the legal estate in the mortgagor, without a reconveyance; and where the condition is not strictly performed, the case is much stronger. (a)<sup>1</sup>

Where the mortgage is made by a *demise for years*, the *proviso* is, that if the money be paid at the time specified, the *term shall cease*. And it is agreed that where the money is not paid at the time specified, the term becomes absolute, and must be surrendered or assigned.

In the case of ancient mortgages, a court of justice might presume a reconveyance of the legal estate; but this presumption admits the necessity of such reconveyance. (b)

(a) Harrison v. Owen, 1 Atk. 520.

(b) Tit. 12, c. 2.

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pose, that such mortgage constitutes a legal title. The existence of a satisfied mortgage may throw a cloud over a title, to the injury of the owner, and may prevent a profitable sale. The evidence of payment is liable to be lost, or may exist only *in pais*, and depend upon the testimony of witnesses, whose death may take place long before a legal presumption of satisfaction can arise. No person can be insensible to the value of a clear unincumbered title apparent upon the face of the public records; nor of the inconvenience of subjecting purchasers to the unravelling of accounts between mortgagors and mortgagees. The law, therefore, may wisely require, that what is a charge upon record should, when discharged, be evidenced by an instrument of as high verity, not only as a preventive of litigation, but as a security of title, even though the charge were extinguished at law; as equity sometimes orders instruments to be delivered up, upon which there would be a good defence at law. A construction of the statute quite as natural as that contended for at the bar is, that it supposes the mortgage extinguished at law by payment, and means only to provide a remedy for damages sustained by the refusal of the mortgagee to put an acknowledgment of such payment on record." 3 Mason, R. 526.

The general doctrine above stated, was clearly maintained by that eminent jurist, Chancellor Kent. See 4 Kent, Comm. p. 193—196, 4th ed.

It may be further remarked, that the practice, almost universal in the United States, is to insert in the mortgage deed, whether of a freehold or a chattel interest, a proviso, that, on payment of the money at the time mentioned, the deed shall be void. And as the time of performance is not of the essence of this contract, and may be waived by parol, the acceptance of the money after the day amounts to a waiver of the time, and is a substantial performance of the condition.

<sup>1</sup> In American mortgages, the proviso most usual, is, that the deed shall be void. See the preceding note.

A mortgagor cannot compel the mortgagee to reconvey the premises, prior to the time fixed for repayment of the mortgage-money; although he should tender the full amount of principal and interest due at the time of the tender. *Brown v. Cole*, 9 Jur. 290.

## CHAP. III.

## EQUITY OF REDEMPTION.

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| <p>SECT. 1. <i>Nature of.</i><br/>         5. <i>Similar to a Trust Estate.</i><br/>         8. <i>Is alienable, devisable, and descendible.</i><br/>         9. <i>May be mortgaged and charged.</i><br/>         11. <i>Subject to Curtesy.</i><br/>         13. <i>But not to Dower.</i><br/>         15. <i>Unless the Mortgage be for Years.</i><br/>         16. <i>Subject to Crown Debts.</i><br/>         17. <i>Is Assets in Equity.</i><br/>         22. <i>And sometimes legal Assets.</i><br/>         24. <i>Effect of a Devise for Payment of Debts.</i><br/>         26. <i>Who may redeem.</i><br/>         27. <i>A subsequent Incumbrancer.</i><br/>         30. <i>A Dowress, Jointress, and Tenant by the Curtesy.</i><br/>         33. <i>The Crown.</i></p> | <p>SECT. 35. <i>Whoever redeems must do Equity.</i><br/>         56. <i>No precise Time is fixed for Redemption.</i><br/>         57. <i>But twenty Years' Possession is a bar.</i><br/>         62. <i>Exceptions. I. Where there is a Disability.</i><br/>         68. <i>II. Where an Account has been settled.</i><br/>         72. <i>III. Where the Mortgage has been acknowledged.</i><br/>         77. <i>IV. Where no Time is appointed for Payment.</i><br/>         84. <i>V. Where the Mortgagor continues in Possession.</i><br/>         88. <i>VI. Where there is Fraud in the Mortgagee.</i><br/>         90. <i>[Committees of Lunatic Mortgagee may convey.]</i></p> |
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SECTION 1. We have seen that when the money borrowed on mortgage is not paid at the time specified, the mortgage becomes forfeited at law, and the legal estate absolutely vested in the mortgagee; but that the Court of Chancery still allows the mortgagor a *reasonable time to redeem*, on payment of the principal, interest, and costs; which is called an *equity of redemption*.<sup>1</sup>

<sup>1</sup> In those American States in which the cognizance of mortgages is vested in courts of general chancery jurisdiction, the rules of English law, stated in the text, form the general outline of the course of administering justice. But in very many of the States these rules, and the course of practice, are modified to a considerable extent by statutes. In *Maine* and *Massachusetts*, the land may be redeemed by a tender of the amount due, at any time within three years after entry of the mortgagee for the purpose of foreclosure, or other equivalent proceeding; or, by a bill in chancery, or statute process in the nature of a bill, without a tender. And in the latter State, if the money tendered is

2. An equity of redemption is a mere creature of a court of equity, *founded on this principle*, that as a mortgage is nothing more than a pledge for securing the repayment of a sum of money to the mortgagee, it is but natural justice to consider the ownership of the land as still vested in the mortgagor, subject only to the legal title of the mortgagee; so far as such legal title is necessary to his security.

3. By the statute 4 William & Mary, c. 16, it is enacted, that if any person shall borrow money, &c., or become indebted for any other valuable consideration, and for the payment thereof shall voluntarily give a judgment, statute, or recognizance, and shall afterwards borrow any other sum of money, or for any other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof shall mortgage lands to the second lender, or to any other person in trust for him, and shall not give notice to the mortgagee of such judgment, &c., in writing, before the execution of the said mortgage or mortgages, such mortgagor shall have no benefit in the equity of redemption of the lands mortgaged, unless such mortgagor or his heirs, upon notice given by the mortgagee in writing, under his hand and seal, attested by two witnesses, of such former judgment, &c., shall within six months, pay off and discharge the same, and cause the same to be vacated and discharged; and if any person, who shall once mortgage lands for a valuable consideration, shall again mortgage the same lands, or any part thereof, to any person, the former mortgage being in force, and shall not discover in writing, to the second mortgagee, the first mortgage, such

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refused by the mortgagee; the mortgagor may recover the land if he sues within a year. [On a bill to redeem, where the mortgagee had entered to foreclose for non-payment of interest, and pending the bill to redeem, the principal of the mortgage debt had become due, it was held, that the mortgagor, in order to redeem, must pay the whole sum due, principal and interest. *Adams v. Brown*, 7 Cush. 222; *Stewart v. Clark*, 11 Met. 384; *Mann v. Richardson*, 21 Pick. 355.] In several of the States, the common-law doctrine that a performance, or tender of performance, discharges the lien of the creditor, is expressly applied by statute to mortgages, rendering the title of the mortgagee thenceforth void. Such is the case in *New Hampshire*; in which State the mortgagor may redeem by performance or tender, after as well as before the breach of the condition. See *Maine*, Rev. St. 1840,\*ch. 125, § 6, 16; *Mass.* Rev. St. 1836, ch. 107, § 15—20; *N. Hamp.* Rev. St. 1842, ch. 131, § 4, 13. And see *post*, ch. 6, § 1, note. In those States where the foreclosure is by sale of the lands, the sales are in most cases directed to be made in the same manner as sales on executions issued on judgments at law; for which see *ante*, tit. 14, § 97, note.

mortgagor shall have no relief, or equity of redemption, against the second mortgagee.<sup>1</sup> *Provided*, that this act shall not extend to bar any widow of any mortgagor of her dower, who did not legally join with such husband in such mortgage, or otherwise lawfully exclude herself.

4. It has been determined on the construction of this statute, 1. That if a mortgage becomes irredeemable by this statute, it will remain so in the hands of an assignee, though assigned in consideration of the principal, interest, and costs due thereon. 2. That if a subsequent mortgagee redeem such a mortgage, he shall hold the estate irredeemable. 3. That if there are more lands in the second mortgage than in the first, that seems to be a case omitted out of the statute. But the adding an acre or two shall not exempt it; for that may be a contrivance to evade the statute. (a)

5. An equity of redemption is *similar, in many respects, to a trust estate*; for the mortgagee is entitled to and holds the lands merely as a pledge for securing the repayment of money; and in most other respects is a trustee for the mortgagor.

6. Lord Hale says, there is a *diversity* between a *trust* 94 \* and a \**power of redemption*. For a trust is created by the contract of the party, and he may direct it as he pleases. Therefore one that comes in, in the *post*, shall not be liable to it without express mention made by the party. But a power of redemption is an equitable right, inherent in the land; and bound all persons, in the *post*, or otherwise, because it was an ancient right to which the party was entitled in equity. (b)

7. While the mortgagor is allowed to retain possession of the estate, after forfeiture, he is in the same situation *quoad* the mortgagee as he was before the mortgage was forfeited. But *quoad* strangers his possession, both before and after forfeiture,

(a) *Stafford v. Selby*, 2 Vern. 589.

(b) *Hard*, 69. 17 Ves. 133.

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<sup>1</sup> There is a provision, similar to this, in the statutes of *South Carolina*; see Stat. at Large, Vol. II. p. 535, 536; and of *Georgia*; see Hotchkiss, Dig. p. 421; and of *Tennessee*; Caruth. & Nichols. Dig. p. 497; and of *North Carolina*; L.L. N. Car. Vol. I. p. 232. But they are all originally of colonial enactment, probably either in the absence of any registration laws, or under the idea that registration was not notice to all the world. In the other States, this subject is left to be dealt with upon general law. See, as to registration, *post*, Vol. IV. tit. 32, ch. 28.

has always been considered as similar to that of a *cestui que trust*, and attended with the same consequences in equity as a seisin in deed of a legal estate at law. And Lord Hardwicke has laid it down, that a person entitled to any equity of redemption, who is in the receipt of the rents and profits, has such a seisin and possession of the equitable estate in the land, as, in the consideration of a court of equity, is equivalent to an actual seisin of a legal estate in a court of law. And in a modern case it has been determined, that an equity of redemption may be divested, and an adverse possession of it obtained. (a)

8. It follows that an *equity of redemption* may be *aliened, entailed, and devised* by will, in the *same manner as a trust estate*. It is also *descendible* to the heir of the mortgagor. There may be a *possessio fratris* of it, and it will follow the customary descent; for if lands held in borough English are mortgaged, the equity of redemption will go to the youngest son, to whom the legal estate would have descended. So in a mortgage of lands held in gavelkind, the equity of redemption will go to all the sons.

9. An equity of redemption may be *mortgaged*. But a mortgage of this kind which is usually called a second mortgage, is seldom recommended by conveyancers, for two reasons: 1. Because a third mortgagee without notice may, by paying off the first mortgage, acquire a preference over the second.<sup>1</sup> 2. Because great difficulties may arise in calling in the money: for as a second mortgagee has no legal remedy, he is driven to the tedious and expensive process of a suit in equity, to recover even his interest. There is, however, one case where a second mortgage may be accepted; that is, if he can get in a term for \* years prior to the first mortgage; for the acquisition of \* 75 such a term will give the second mortgagee the legal estate. (b)

(a) *Infra*, § 13, *Cholmondeley v. Clinton*, tit. 31, c. 2, § 67.

(b) *Vide infra*, c. 5. *Willoughby v. W.*, T. R. 763. S. C. 1 Powell, *Mortg.* [493,] 5th ed.

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<sup>1</sup> In the United States, where all deeds are registered, and registration is notice to all the world, no mortgagee can lose his priority but by his own laches; and *puisne* mortgagees, without actual notice of the prior lien, may gain priority by diligence in registration; liens ordinarily having precedence in the order of their registration. Hence the rule stated in the text can rarely apply. *Thompson v. Chandler*, 7 Greenl. 377; 4 Kent, Comm. 174—180. See *post*, Vol. IV. tit. 32, ch. 28.

10. A person having an equity of redemption in fee may charge it with the payment of an annuity. Thus Lord Eldon has said, that if a person, having an equity of redemption of an estate mortgaged in fee, had granted an annuity, that would have been established in a court of equity; where, though not at law, this interest is acknowledged, and would have been rendered liable to the annuity. (*a*)

11. An equity of redemption is *subject to curtesy*; so that where a man marries a woman who is entitled to an estate that is mortgaged in fee, and has issue by her, he will be allowed in equity to hold it during his life as tenant by the curtesy.

12. A woman being seised of certain lands, made a mortgage in fee of them for securing £900. She afterwards married, and died without having paid off the mortgage, leaving issue a son. Her husband claimed to be entitled to the lands for his life, as tenant by the curtesy.

The Master of the Rolls (Sir J. Jekyll) held he was not entitled.

On an appeal to Lord Hardwicke, he observed that the case depended on two considerations: 1. What kind of interest an equity of redemption was considered to be in a court of equity. 2. What was necessary to entitle a husband to be tenant by the curtesy. As to the first, an equity of redemption had always been considered as an estate in the land; it was such an interest as would descend from the ancestor to the heir; it might be granted, entailed, devised, or mortgaged, and that equitable interest might be barred by a common recovery; which proved that an equity of redemption was not considered as a mere right, but such an estate whereof, in consideration of equity, there might be a seisin; or a devise of it could not be good.

The person entitled to the equity of redemption was, in equity, considered as the owner of the land, the mortgagee only retaining it as a pledge or deposit; and for this reason it was, that a mortgage in fee was considered as personal estate, notwithstanding the legal estate vested in the heir of the mortgagee, in point of law. The husband of a mortgagee in fee could never be tenant by the curtesy of the mortgaged estate, unless there was a foreclosure; or the mortgage had subsisted for so great a length

(*a*) *Tucker v. Thurstan*, 17 Ves. 131.

of time as the Court of Chancery thought sufficient to \* induce it not to grant a redemption. As a mortgage in \* 96 fee was only a *chose in action*, if the ownership of the land was not in the mortgagor, it was in nobody. An equity of redemption was no otherwise a right of action than every trust; and as there could be no benefit had of an equity of redemption, but by *subpœna* out of chancery, so was the case of every mere trust out of land, which was considered as real estate in chancery, but could not be come at without a *subpœna*.

It was true, a mortgagee was not barely a trustee for the mortgagor; but it was sufficient for the present purpose if he was in part a trustee for the mortgagor. And it was most certain that, as to the real estate in the land, the mortgagee was only a trustee for the mortgagor; for, until foreclosure, the mortgagee was only owner, as a charge or incumbrance, and entitled to hold as a pledge. As to the inheritance and real estate in the land, the mortgagee was a trustee for the mortgagor, until the equity of redemption was foreclosed.

Secondly, what was requisite to entitle the husband to be tenant by the curtesy? Four things, viz., marriage, issue, death of the wife, and seisin. It was admitted that the three first did occur; but the objection relied on was, that there was no actual seisin of the wife during the coverture; which was contended to be as necessary in respect to an equitable as to a legal estate. The true question upon this point was, whether there was not such a seisin or possession in the wife, of the equitable estate in the land, as in consideration of equity was equivalent to an actual seisin of a legal estate at common law. That in the consideration of the Court of Chancery, he was of opinion, there was such a seisin of the wife, in the present case, of the equity of redemption. He had shown that a person entitled to the equity of redemption, was owner of the land; if so, there must be a seisin of the estate. And what other seisin could there be than what the husband and wife had in the present case? for the wife was all along in possession until her death, and the mortgagee did not come into possession until after her death, nor was there any foreclosure. And though the possession of the wife was but as tenant at will to the mortgagee, yet it was, in equity, a possession of the real owner of the land, subject only to a pecuniary charge on it;

and from thence it followed, that there could not be a higher seisin of an equitable estate.

97 \* That the husband might be tenant by the curtesy of this equitable estate, he cited *Williams v. Wray*, and *Sweetapple v. Bindon*; and observed that there had been two objections made: 1. That the husband had it in his power to have had seisin in his wife's lifetime, for he might have paid off the mortgage; therefore it was his own laches that he did not. 2. That a woman was not dowable of an equity of redemption.

As to laches in the husband, it was compared to his not making an entry at law; but the comparison would not hold; for it was not so easy to pay off the principal and interest due on a mortgage, as to make an entry at law; nor was it to be done so speedily, for a mortgagee was in most cases allowed six months' notice to be paid. In the case of *Sweetapple v. Bindon*, the husband might have brought his bill in his wife's lifetime, to compel the laying out the money in the purchase of lands; but though he omitted to do so till after his wife's death, yet that was not objected to him as laches.

As to the objection of a wife's not being endowed of an equity of redemption of a mortgage in fee, and that therefore a husband ought not to be tenant by the curtesy of an equity of redemption, this proved too much; for it had been determined that a wife shall not be endowed of a trust estate, yet that a husband shall be tenant by the curtesy of it. The argument from dower to curtesy failed in this case. Perhaps it would be hard to find a sufficient reason how it came to be so determined in one case, and not in the other; but it was safe to follow former precedents, and what were settled and established; and if such precedents should be departed from, he held it fit rather that the wife should be allowed dower of a trust estate, and not that curtesy of a trust estate should be taken away. Decreed that the husband was entitled to curtesy. (a)

13. A widow, however, is *not allowed to have dower out of an equity of redemption of a mortgage in fee made before the marriage*; upon the principle that it was analogous to a trust

(a) *Casburne v. Inglis*, 2 Ab. Eq. 728. 1 Atk. 603. 2 Jacob & Walker's Rep. App. No. 2. Tit. 5, c. 2.



estate.† And however severe this doctrine may seem, yet it was solemnly confirmed in the following case. (a)<sup>1</sup>

\*14. Abraham Dixon, being seised in fee of considerable estates, died in 1782 without issue, leaving Ann Dixon, the plaintiff, his widow, having devised his estates to trustees upon several trusts. Abraham Dixon, not having in his lifetime made any settlement or other provision for his wife, in lieu or bar of dower, and she not having done any act to bar herself thereof, filed her bill against the trustees, stating the above facts, claiming dower out of all the testator's real estate, and praying to be let into the receipt of one third part of the rents and profits thereof. \*98

To this bill the trustees answered, that the testator had borrowed a large sum of money upon mortgage; and for securing the repayment thereof, had, previous to his marriage with the plaintiff, conveyed the premises to the mortgagee in fee, subject to a proviso for redemption; that the legal estate in the premises being, by this mortgage, absolutely vested in the mortgagee, previous to and at the time of the marriage of the testator with the plaintiff, and not being at any time afterwards reconveyed to him, but remaining vested in the mortgagee, at the time of his death; and he being therefore only entitled to the equity of redemption thereof, at the time of his marriage, and at all times thereafter, till the time of his death; the plaintiff was not at any time dowerable in or out of the said premises, either at law or in equity.

On the hearing, the plaintiff could have proved by witnesses that the testator, her husband, understood and declared,<sup>2</sup> that after his death his widow would be entitled to dower out of his real

(a) Tit. 12, c. 2.

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[† By the Stat. 3 & 4 Wm. 4, c. 105, § 2, 14, statute widows, married after the 1st of January, 1834, are entitled to dower out of equitable estates.]

<sup>1</sup> See *ante*, tit. 6, ch. 2, § 10, note; *Ib.* § 25, note. See also Mr. Rand's note to 2 Pow. on Mort. 699.

<sup>2</sup> Mr. Powell, in the third edition of his book on Mortgages, Vol. II. p. 695, *a*, (by Coventry & Rand,) says, that he has since been informed by the gentleman who drew the will in this case, that no such declaration could have been made; and that the question alluded to, as put by Mr. Dixon to the drawer of the will, was not put at the time of the making, nor at any other time in his recollection; he having drawn it without the knowledge of any mortgage or other charge affecting the estate.

estates; that he made his will under that idea; and it could have been also proved, if relevant, by the person who drew it; Mr. Dixon having put the question to him, whether Mrs. Dixon would not be entitled to dower, to which he, being at that time ignorant of the mortgage, answered, that she certainly would. The will itself sufficiently spoke the idea; for the testator bequeathed to the plaintiff, by the name of his dear wife Ann Dixon, his coach and harness, and a pair of horses, together with as much of his plate as she should think proper, not exceeding the sum of £60; which things she could have no occasion for, if she had not dower to support her.

The claim of the widow was supported on three grounds:

1st, The general law. 2dly, The distinction between a  
99 \* mere \*trust and an equity of redemption. 3dly, The  
authorities in favor of dower, under circumstances not more favorable than those attending this case.

Under the first of these heads it was observed, that dower was a right of the first attention and most sacred preservation at the common law. It was a right, not only founded in our law, but a right consonant to the first principles or laws of morality and equity, as springing from the moral obligation a man was under to make a provision for his wife. And accordingly it was in a variety of cases, aided and extended beyond its strict legal limits, by the interposition of courts of equity, in removing trust terms, and other obstructions to it, in certain cases, which would stand in the way of it at common law. This proved it to be a right not merely confined to the common law, but a right recognized, protected, and aided in equity; and which, so far as it was the subject of relief in equity, was an equitable right. This was the predicament in which it stood in the cases of *Dudley v. Dudley*, *Wray v. Williams*, and the other cases in which it had been decided that a dowress should have the benefit of a trust term attendant on the inheritance, as against the heir. (a)

Considering it, therefore, as an equitable right, it well might be a wonder how it came about that a widow should not be entitled, against the heir, to dower of an equitable inheritance. Some, indeed, had confined the rule of her not being so to the cases where the trust was created by the husband himself. This

(a) Tjt. 12, c. 3.

had been the opinion of the Master of the Rolls in *Banks v. Sutton.* (a) However, this opinion had been overruled; and it seemed to be a settled point, that a widow was not dowable of a direct proper trust.

This naturally led to the second head of argument in favor of the widow; namely, the distinction between a mere trust, that was an use, as it was styled at common law, and an equity of redemption. The former was regarded at common law as quite a distinct interest from the legal estate, to which the right of dower was annexed. It of course did not involve in it that right; if it had, there would have been two opposite rights of dower in the same lands at the same time; as the widow of both the trustee and the *cestui que trust* would have been entitled to dower. For the widow of the trustee was clearly entitled at common law; and when the Court of Chancery interposed to \*prevent the legal title of the widow of the trustee, it \*100 seemed extraordinary that it did not, in its place, substitute an equitable one of the *cestui que trust*. However, these sorts of trusts being the creatures of the parties themselves, whatever were the legal incidents or privileges they wanted, might have been supposed to have been voluntarily relinquished and abandoned by the parties creating those trusts.

But it was otherwise with regard to an equity of redemption: that was not any interest created or reserved by or between the parties, beyond the express time of redemption; it was a mere creature of a court of equity itself, founded on this principle, that as a mortgage was originally nothing more than a pledge or security to the mortgagee for his money, it was but natural justice between man and man to consider the original ownership of the lands as still residing in the mortgagor, subject to the legal title of the mortgagee, so far only as such legal title was requisite to the end of his security; and accordingly the title of the mortgagee was not treated by equity as any thing beyond that point. His beneficial interest, though the mortgage was in fee, was considered only as personal estate; he was not permitted to grant leases, or exercise any other act of ownership, to the prejudice of the mortgagor, to whom he was even accountable for the profits of his estate. His widow was not permitted to

(a) Tit. 12, c. 2.

claim dower; nor could he, or those claiming under him, avail themselves of several other privileges and incidents attending real property.

It seemed to be the regular consequence of the doctrine adopted by the courts of equity, in regard to mortgages, by considering them strictly and merely in the nature of securities for the mortgage money, and entitling the mortgagee to no other of the incidents or privileges of ownership in the lands, than what was requisite for the end of such security; that all such privileges and incidents of ownership of the lands as were not considered as becoming vested in the mortgagee for the purpose of his security, should be held to remain in the mortgagor; or, in other words, that he should to all purposes, not prejudicial to the mortgagee, be considered as the complete owner of the mortgaged lands.

And accordingly this was found to be the established doctrine in several instances, when only volunteers were interested; 101\* such \*as revocations under powers, and revocations of devises; as in the cases of *Thorne v. Thorne*, and *Hall v. Dunch*, and other like cases. (a) That in the case of *Lincoln v. Rolle*, the doctrine was expressly recognized, and admitted on both sides; because in equity a mortgage did not make the estate another's, and because a mortgage was not an inheritance, but a personal estate; and there seemed no reason in the world, why these general incidents of complete ownership should be saved in favor of a devisee, or other volunteer, and not in favor of a wife, whose claims of dower stood upon the strongest grounds of moral and equitable right; and who was in many instances considered as entitled to relief in equity, in regard to an intended provision, when a devisee or other volunteer was not.

Agreeable to this doctrine was the case of *Banks v. Sutton*, where it was decreed in favor of the claim of dower out of an equity of redemption of a mortgage in fee; which decision was founded on a variety of authorities and reasons delivered by the Master of the Rolls; all which were equally forcible in the present case. That the case of *Banks v. Sutton*, was directly in point of the present question; for though the Master of the Rolls

(a) Tit. 32, c. 14. Tit. 38, c. 6. Show. Parl. Ca. 154.

would not take upon himself to determine the question, in regard to dower, out of a mere trust, created, not by the husband, but by some other person, with no time limited for conveying the legal estate; and avoided this point by shifting his ground to that of the husband's being entitled, under the express direction of the will under which he claimed, to have the estate conveyed to him at the age of twenty-one, which circumstance, under the application of a common principle of equity, of considering that as done which ought to have been done of course in equity, let the widow into the same degree of title as she would have had if the trustees had conveyed the estate to her husband at the time directed. And as the principle on which the Master of the Rolls got rid of the first point, did not apply to this, he accordingly found himself constrained, instead of changing his ground as before, to enter into a strict examination of it, and meet the objections to dower with authorities, inferences, and general reasoning; and through them to come to a professed decision of the point, as he expressly did, when he said—"He did not know or could find any instance where dower of an equity of redemption was controverted and adjudged against the dowress."

And \* as there were authorities in cases less favorable, he \*102 therefore declared that the widow of the person entitled to the equity of redemption of the mortgage in question, which was a mortgage in fee, had a right of redemption; and decreed her the arrears of her dower, from the death of her husband; she allowing the third of the interest of the mortgage-money unsatisfied at that time: that an authority more directly in point than this could not be expected.

And though the subsequent case of the Attorney-General *v.* Scott, (a) before Lord Talbot, in which the widow was denied dower, was generally considered as an authority contrary to and superseding that of *Banks v. Sutton*, yet such a conclusion seemed too hasty, as the two cases appeared to differ materially; for in that of the Attorney-General *v.* Scott, although there was a mortgage, yet the question did not turn upon that, because the legal estate was outstanding in trustees, in whom it was vested antecedent to such mortgage; consequently the decision in that case was on a direct proper trust, not on a mere equity of re-

(a) Tit. 12, c. 2.

demption. The difference between a direct trust and an equity of redemption, and between the claim of a widow, and that of a devisee, or mere volunteer, was strongly insisted upon; and the distinction between this case, and that of a claim of dower against a purchaser, fully enforced.

The Lords Commissioners, Loughborough, Ashhurst, and Hotham, said, that the case of an estate by the curtesy in a trust was the anomalous case,<sup>1</sup> not the rule; that the wife should not have dower. And this point was so much settled, that it would be wrong to discuss it much. The bill was dismissed, but without costs, the defendant not praying them. (a)<sup>1</sup>

15. A widow was, however, *entitled to dower* out of an equity of redemption of a mortgage for a *term for years*; because in that case the husband was seised of the freehold and inheritance. And where a mortgage of this kind was satisfied, the Court of Chancery gave the dowress relief, by removing the term: but if the mortgage was not satisfied, then the dowress must keep down a third of the interest, or pay off a third of the principal. (b)<sup>2</sup>

16. The statute 13 Eliz. c. 4, which enacts that all the lands, tenements, and hereditaments of persons who are accountants to the crown, shall be *liable to the payment of crown debts*, 103\* \* extends to equities of redemption; and by the statute 25 Geo. III. c. 35, they may be sold under an extent by the Court of Exchequer. (c)

17. An equity of redemption of a mortgage in fee is not *assets at common law*; for the legal estate not being in the heir, he may plead *riens per descent*.<sup>3</sup> As to the question, whether an equity

(a) Dixon v. Saville, 1783. 2 Powell, Mortg. 37, (693, Coventry's 6th ed.)

(b) 2 P. Wms. 716. (c) Tit. 1, § 68. Rex v. Delamotte, Forr. Rep. in Exch. 162. Tit. 14.

<sup>1</sup> See *ante*, tit. 6, ch. 2, § 25, note.

<sup>2</sup> This rule is now exploded, and the more reasonable rule established, that a tenant for life is bound to contribute to the removal of an incumbrance, only in proportion to the benefit he derives from its removal. See *post*, ch. 4, § 54, note.

<sup>3</sup> This is now altered in England, by the statute 3 & 4 Wm. 4, c. 104. In the United States, where all the property of the deceased debtor, subject to the rights of the widow, is liable as a trust fund for the payment of his debts, the equity of redemption goes into the assets, to be administered by the executor or administrator. In several of the States it is so declared by express statutes; but it seems also necessarily to result from the principle above stated. See *Massachusetts*, Rev. St. 1836, ch. 65, § 15; *Maine*, Rev. St. 1840, ch. 125, § 13; *Vermont*, Rev. St. 1839, ch. 48, § 23; *Michigan*,

of redemption was assets in equity, the courts reasoned by analogy from trust estates, which not being then assets, they held that equities of redemption were not assets. But when it was enacted by the Statute of Frauds that trust estates should be assets, the Court of Chancery held that an equity of redemption should be *assets in equity*. (a)

18. Sir C. Cox, having a term for years, made a mortgage thereof, and died possessed of the equity of redemption, leaving greater debts than his estate would extend to pay. The question was, whether this mere equity of redemption was only equitable assets, and distributable equally *pro rata* among all the creditors, without regard to the degree or quality of their debts, or whether it should be applied in a course of administration; in which last case the bond creditors would swallow up all the assets, without leaving any thing for those by simple contract. Sir J. Jekyll delivered his opinion, that this equity of redemption was equitable assets only, the mortgage being forfeited at law, and the whole estate thereby vested in the mortgagee; so that it was barely an equitable interest. (b)

19. In a subsequent case, Lord Hardwicke also held, that an equity of redemption of a leasehold estate was equitable assets. But in a modern case, Lord Loughborough said, that an equity of redemption was not equitable assets as against judgment creditors, who had a right to redeem. (c)

20. It is held, that an equity of redemption in fee is not assets to pay simple contract debts; for it cannot be reached, at law, by any creditors.<sup>1</sup> It is, notwithstanding, made assets in equity; but only to pay debts of that description to which the land would have been liable, if it had been a legal estate.

21. An equity of redemption of a trust estate is equitable assets, because creditors can only attach this kind of property in a court of equity. (d)

(a) 2 Vern. 61. 2 Atk. 294. Tit. 12, c. 2. (b) Creditors of Sir C. Cox, 3 P. Wms. 341.

(c) Hartwell v. Chitters, Amb. 308. 4 Ves. 542.

(d) Plunkett v. Penson, 2 Atk. 290. (1 Ves. 436. But see Sharpe v. E. of Scarborough, 4 Ves. 538.)

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Rev. St. 1837, p. 285, 286; Ohio, Rev. St. 1841, ch. 47, § 67, 68; Indiana, Rev. St. 1843, ch. 30, § 464. See *infra*, § 38, note (1.)

<sup>1</sup> Altered in England, by Stat. 3 & 4 Wm. 4, c. 104.

104\* \*22. When a person seised *in fee* makes a mortgage by a *demise for years*, the equity of redemption is *assets at law*; because the reversion, which attracts the redemption, being assets at law, the equity of redemption ought to be so too. And a creditor may have judgment at law, with a *cessat executio* during the term. (a)

23. An equity of redemption is, however, *not extendible*, by a judgment creditor, with or without the aid of the Statute of Frauds. (b)<sup>1</sup>

24. It was formerly held, that where an equity of redemption was *devised to an executor for payment of debts*, it then became legal assets; because the devise of it to the executor showed the intention of the testator, that it should be applied like other assets. But where the equity of redemption was devised to trustees, upon trust to pay debts, it was equitable assets. (c)

25. This doctrine has been altered; and it is said to be now established, that a devise to a mere executor shall bear the same construction as a devise to a trustee: that there is no reason to suppose the testator's meaning to be different in the one instance from the other: that, even in the case of a mere power, on the part of the executor, to sell, the descent seems to be broken, inasmuch as the vendee is in by the devisor; but that, whether the descent in such case be broken or not, the *assets* shall be equally *equitable*. In short, that if the real estate be, by any means, given to the executor, the produce of it, when sold, shall not be applied in a course of administration, but be distributed as equity prescribes. (d)

26. An equity of redemption being alienable and devisable, it follows that *all those who derive an interest from the mortgagor by purchase or devise, may redeem the mortgage*. Where an

(a) 2 Atk. 294.

(b) *Lyster v. Dolland*, 1 Ves. jun. 431. See 4 Mad. 503.

(c) *Girling v. Lee*, 1 Vern. 63.

(d) *Toller*, Exec. B. 3, c. 8, p. 414, (6th ed.) *Newton v. Bennet*, 1 Bro. C. C. 137, 138. *Deg v. Deg*, 2 P. Wms. 412. *Walker v. Meager*, Ib. 552. 3 Ib. 342. 2 Atk. 290. 2 Fonbl. Eq. 399, n. (4th ed.) *Harg. Co. Lit.* 113, a. n. 2.

<sup>1</sup> The equity of redemption, in the United States, is by statutes made liable to execution for the debts of the mortgagor or his assignee. See 4 Kent, Comm. 160, 161. *Ante*, § 17, note. [The first mortgagee of land may sell on execution, to satisfy the mortgage debt, the mortgagor's right to redeem a second mortgage of the same land. *Johnson v. Stevens*, 7 Cush. 431.]



equity of redemption is not disposed of by the mortgagor in his lifetime, or by his will, his heir becomes entitled to it. And it has been stated that, if the descent be customary, the equity of redemption will go according to the custom. [It may be laid down as a general rule that any person having an interest in or lien upon the land may redeem.] (a)

27. Any *subsequent incumbrancer* may redeem a mortgage;<sup>1</sup> such as a *judgment creditor*. But if the mortgage be of a term in gross, the judgment creditor must sue out a writ of execution, \*before he brings his bill to redeem; for, till \*105 execution, a judgment is not a lien on a term for years. (b)

28. A *creditor by statute* has been allowed to redeem a mortgage, after a decree of foreclosure.

29. A bill was brought by the cognizee of a statute, acknowledged by the mortgagor, to redeem a mortgage, after a decree of foreclosure. The defendant pleaded the decree of foreclosure; that the statute was acknowledged after the mortgagee's bill was filed; that the mortgagee had no notice, and had made proper

(a) 1 Russ. & M. 741.

(b) *Greswold v. Marsham*, 2 Cha. Ca. 170. *Stonehewer v. Thompson*, 2 Atk. 440. (*Brinckerhoff v. Brown*, 4 Johns. Ch. R. 671.) *Shirley v. Watts*, 3 Atk. 200.

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<sup>1</sup> Thus, a subsequent mortgagee may redeem. *Thompson v. Chandler*, 7 Greenl. 377. So, the widow of the mortgagor; *Messiter v. Wright*, 16 Pick. 151; one of several of his grantees; *Allen v. Clark*, 17 Pick. 47; *Taylor v. Porter*, 7 Mass. 315; or, his judgment creditor, if he can show a good subsisting mortgage, which the mortgagor could go into a court of equity and redeem. *Tucker v. White*, 2 Dev. & Bat. Eq. R. 289. The rule is, that the persons entitled to redeem in equity are those who, within the time limited by the mortgage deed, would have been entitled to redeem at law. *Skeffington v. Whitehurst*, 3 Y. & Coll. 2.

The doctrine in the text is founded on this general principle, that the equity of redemption is a subsisting estate, and interest in the lands, not only in the hands of the heirs, devisees, assignees, and personal representatives, strictly so called, of the mortgagor, but also in the hands of any other persons who have acquired any interest in the lands mortgaged by operation of law, or otherwise, in privity of estate. 2 Story, Eq. Jur. § 1023; 4 Kent, Comm. 162—164. [*Farnum v. Metcalf*, 8 Cush. 46. The grantee of an estate upon condition, who mortgages to his grantor, and, after a foreclosure by the mortgagee, files his bill to redeem, a breach of the condition having occurred, will be allowed to redeem only upon removing all the incumbrances specified in the mortgage, and performing the condition annexed to his deed. *Stone v. Ellis*, 9 Cush. 95. An assignee of a term of years in land previously mortgaged, may, to protect his estate, redeem such mortgage, though the leasehold premises are but part of the estate mortgaged; and the party redeeming has a right to an assignment of the mortgage, and if it be recorded, to an acknowledgment of the assignment. *Averill v. Taylor*, 4 Selden, N. Y. 44.]

parties at the filing of his bill. Mr. Vernon said, if an incumbrancer lies by, and suffers the mortgagee to obtain a decree of foreclosure, though he is not bound by the decree, because not made a party, yet, if he afterwards brings a bill to redeem, he shall not be at liberty to except to the accounts stated by the Master, but shall pay the whole upon his redemption. Lord Harcourt said,—“This is a recent foreclosure; let the plaintiff redeem, upon payment of what is due, with costs.” (a)

30. In the case of a mortgage for a term of years, if *the widow* be endowed of a third of the reversion, she may redeem the mortgage, and hold the lands till she is repaid two thirds of the money she has advanced.

31. A *woman entitled to a jointure* out of lands that are in mortgage, may also redeem, as appears from a case which has been already stated. (b)

32. A *tenant by the curtesy* may also redeem a mortgage, and hold the lands till he is repaid what he had advanced. (c)

33. The *crown* may redeem a mortgage on an estate forfeited by the outlawry of the mortgagor for high treason.

34. Sir Roger Strickland, having made a mortgage of his estate, was afterwards indicted and outlawed for high treason. The Attorney-General thereupon exhibited a bill in the Court of Exchequer, to discover the consideration of the mortgage, what was due upon it, praying that the crown might redeem, if any thing was due. The Court directed several issues to be tried relative to the consideration of the mortgage. Upon trial, verdicts were found in favor of the mortgagee; but these verdicts were so general that application was made, on behalf of the

106 \* crown, for a new \* trial. This was not only refused, but the Court, on hearing the cause upon the equity reserved, ordered the information to stand dismissed. On an appeal to the House of Lords, this decree was reversed, and the Attorney-General, on behalf of the crown, was admitted to redeem. (d)

[So also in Sir S. Lovell's case it was decided that the assignee of the crown might redeem.†]

(a) Crisp v. Heath, 7 Vin. Ab. 52.

(b) Howard v. Harris, c. 1, § 24.

(c) See Casburne v. Inglis, 2 Jac. & Walk. Appdx. II. 194.

(d) Att.-General v. Crofts, 4 Bro. Parl. Ca. 136. Vide Pawlett v. Att.-Gen., Hard. 465.

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[† Sir S. Lovell's case, 1 Salk. 85, cited 1 Eden, 210. See also 2 Atk. 223.]

35. It is a maxim that *he who will have equity must himself do equity*; in consequence of which it has been long established, that when a mortgagor requires the redemption of his estate, he must in his turn allow full equity to the mortgagee. (a)

36. A person borrowed money upon mortgage, and afterwards borrowed more money from the same person upon bond; the mortgage was forfeited. The Court said, although there was no special agreement proved in the case that the land should stand as a security for the bond debt, yet the mortgagor should not redeem without paying both. (b) <sup>1</sup>

37. This doctrine was, however, soon altered; and it is said by Mr. Vernon, and agreed to by the Court, in Trin. 1715, that if a man had a debt owing to him by mortgage, and another on bond from the same person, he *could not tack them together against the mortgage*; but would be let in to a redemption on payment of the mortgage money only. (c)

38. [But in order to avoid circuitry of action, the law is *otherwise with respect*] to the heir at law of the mortgagor, who cannot redeem a mortgage made by his ancestor, without paying off the

(a) St. John v. Holford, 1 Cha. Ca. 97.

(b) Baxter v. Manning, 1 Vern. 244. (See 1 Pow. on Mortg. 338, 6th ed. Powis v. Corbet, 3 Atk. 556. Scripture v. Johnson, 3 Conn. R. 211. Post, c. 5, § 28.)

(c) Challis v. Casborn, Prec. in Cha. 407. Archer v. Snatt, 2 Stra. 1107. 2 Ves. jun. 376.

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<sup>1</sup> The doctrine of tacking, though now established in England, is there taken with this most important qualification, that the party, who seeks to avail himself of it, is a *bonâ fide* purchaser, without notice of the prior incumbrance, at the time when he took his original security; for if he then had such notice, he has not the slightest claim to the protection or assistance of a Court of Equity. But in the United States, tacking is never allowed, as against mesne incumbrances which are duly registered; for the plain reason that registration under the registry acts, which exist in all the States, is held to be constructive notice to all persons; and the acts themselves, some in express terms, and all by clear implication, declare the priority to be fixed by the registration. See 1 Story, Eq. Jur. § 421; 4 Kent, Comm. 177—179. So the latter point is held under the Irish registry act. Latouche v. Lord Dunsany, 1 Sch. & Lefr. 157. And see Bond v. Hopkins, Ibid. 430. See also Dorrow v. Kelley, 1 Dall. 142; Grant v. U. S. Bank, 1 Caines, Cas. 112; Cleaveland v. Clarke, Brayt. 166; Bridgen v. Carhartt, 1 Hopk. 234. In most of the United States, also, the statutes, providing for the redemption of mortgaged estates, expressly give this right of redemption, on payment or tender of the amount due upon the mortgage. See Loring v. Cooke, 3 Pick. 48, 50; Green v. Tanner, 10 Metc. 411. In Connecticut, where no such statute existed, the rule stated in the text has been applied. Scripture v. Johnson, 3 Conn. R. 211, 213. See post, § 55, note.

money due on bond; because, upon the ancestor's death, the bond becomes the heir's own debt. (a)<sup>1</sup>

39. The same rule has been adopted in the case of mortgages for terms of years. Thus if the executor of the mortgagor brings a bill to redeem, he must pay both the mortgage-money and the bond debt. (b)

40. Since the statute made against fraudulent devises, the *devisee* of an equity of redemption cannot redeem without paying off a debt upon bond, as well as the money due upon mortgage; because that statute puts the devisee in the same situation as the heir. (c)

107\* \*41. If a person first lends money upon bond, and afterwards takes an assignment of a mortgage, he has the same equity against the mortgagor and his heirs, to have *both debts* paid. (d)

42. If part of the money, originally secured by a mortgage, be paid off, and a further sum is borrowed from the same parties, upon a *defective security*, no redemption will be granted unless *both sums* are paid.

43. Husband and wife mortgaged the wife's land by fine for

(a) *Shuttleworth v. Laycock*, 1 Vern. 245.

(b) *Anon.* 2 Vern. 177. 1 P. Wms. 776.

(c) Tit. 38, c. 1. 1 Will. 4, c. 47. (4 Kent, Comm. 175.) 1 Ab. Eq. 325. Prec. in Cha. 407.

(d) *Hallelay v. Kirtland*, 2 Ch. R. 361.

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<sup>1</sup> In the settlement of estates, it is a cardinal rule of American law, that all the property of the deceased is charged as a trust fund for the payment of his debts. The personality is first to be exhausted; after which the executor, on application to the proper Court, obtains license to sell all or so much of the real estate as may be necessary to pay the remaining debts; the proceedings being regulated by statutes. Ordinarily, therefore, remedy can be had, in the first instance, only against the executor or administrator; the heir being liable only in regard to those debts for which no action could have been had against the personal representative within the period mentioned in the statutes limiting such actions. *Royce v. Burrell*, 12 Mass. 395; *Webber v. Webber*, 7 Greenl. 127. The land descends to the heir, upon the death of the ancestor; his title being liable to be divested by a sale by the executor or administrator, as above stated. *Gibson v. Farley*, 16 Mass. 280. If he should apply to redeem a mortgage of his ancestor, in those States in which statute provisions exist entitling the mortgagor to redeem on payment of the mortgage money, it is conceived that the doctrine in the text could not be applied to his case. But in all other cases, where the redemption of the land would immediately constitute it assets in the hands of the heir, in respect to which he would be liable to the same creditor on the obligation of his ancestor, the principle in the text, of avoiding circuitry of action, would doubtless be applied by a Court of Equity here, as in England. See 4 Kent. Comm. 175; 1 Story, Eq. Jur. § 418; 2 Story, Eq. Jur. § 1010; 1 Pow. on Mort. 348, note (G) by Coventry. See *supra*, § 17, note (2.)

£400, and the mortgage was forfeited. The husband paid off part of the mortgage money, but afterwards borrowed it back again. Decreed that the mortgagee having the estate in law in him, by the forfeiture of the mortgage, he should hold the land against the heir of the wife, until the whole money was paid. (a)

44. This privilege is *only allowed against the mortgagor, his heir or devisee*; not against a purchaser or assignee of the equity of redemption, who may redeem without discharging a bond debt due to the mortgagee; because the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not. (b)

45. A, seised in fee of lands, made a mortgage to B for £100, afterwards borrowed £100 more of B upon bond, and died. The heir at law conveyed the inheritance and equity of redemption to trustees, in trust for the payment of all the bond and simple contract debts of his father, equally; after which the trustees brought their bill to redeem against B, who insisted on being paid his debt by bond, as well as that by mortgage. It was decreed, that though the heir must have paid the bond debt, before he was allowed to redeem, because it became his debt on the death of his ancestor; yet it could not be said to be due from the assignee of the heir, the bond being no lien upon the land. (c)

46. A settlement was made by a father on the marriage of his son, with a covenant, that it should be free from incumbrances; in consideration of which the son covenanted to reconvey part of the estate, after the father's death, or to pay £300 to such persons as the father should appoint. The father created an incumbrance of £300 by mortgage; afterwards appointed £300 to his daughter, and died. The son brought a bill to have the estate disincumbered of that mortgage; also to have a bond of the \*father's to the mortgagee delivered up, and dis- \*108 charged out of the assets of the father.

Lord Hardwicke said, the plaintiff had a plain equity to have the estate disincumbered of the mortgage brought on it, in fraud of the marriage settlement. As to the bond, where the mortgagor of an estate, either before or after the marriage, contracted

(a) Reason v. Sacheverell, 1 Vern. 41. 2 Cha. Ca. 98. See also Pitt v. Pitt, 1 T. & Russ. 180. (b) 1 Ves. 87.

(c) Coleman v. Wynce, 1 P. Wms. 775. Prec. in Cha. 511. Bayly v. Robson, Prec. in Cha. 89.

another debt with the mortgagee, for which he gave a bond, and died, and the equity of redemption descended to the heir at law, a court of equity would permit the mortgagee to tack the bond to the mortgage, because otherwise it would cause an unnecessary circuitry; and the heir at law was debtor for both. But where the person claiming the equity of redemption, was a purchaser for a valuable consideration, there was no right to tack the bond to the mortgage, because the estate was not liable to the bond debt. Though the plaintiff was entitled to be indemnified, as against the father, for what he was bound to pay by the father's bond; yet he was entitled only out of the father's assets. (a)

47. If there are several incumbrances on an estate, and a prior incumbrancer claims a debt secured by bond, he will not be allowed to add it to his mortgage; but it will be postponed to all real incumbrances, whether by mortgage, judgment, or statute. For the bond is no charge on the estate; nor has he the same equity against a subsequent incumbrancer, as against an heir at law; who is liable to the bond, if he has assets.

48. A creditor, by judgment, in 1698, for £600, comes to an account in 1707 with the conusor, and settles the remainder due upon the judgment at £420; and then takes a mortgage in fee for that sum, as a collateral security to the judgment. One Saunders, an attorney, in 1716, takes an assignment of this mortgage, in which there is a recital, that £90, the consideration of the assignment, was then the full worth of the estate; and the assignment, likewise, was made at a time when there was a suit depending between particular creditors, upon several other estates of the mortgagor, in conjunction with judgment creditors at large, and the representatives of the mortgagor. Saunders was in possession, too, of another mortgage in 1688, upon the same estate as was subject to the judgment in 1698, and the mortgage in 1707.

Lord Chancellor. "Saunders shall not be allowed to tack the two mortgages together, viz., that in 1688, and the other in 1707, so as to defeat intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 shall have relation back to the judgment in 1698; and, by consolidating them together, shall entitle Saunders to receive the sum due upon that judgment prior to creditors after the year

(a) *Troughton v. Troughton*, 1 Ves. 86.

1698; but as to money reported due since the year 1707, Saunders is to be paid only in priority to creditors subsequent to 1707.

“*The rule of the Court*, as to prior incumbrancers taking in a subsequent incumbrance, so as to tack it to the prior, is, where he is a *bonâ fide* purchaser of the *puisne* incumbrance, *without notice* of intermediate ones. But here, the *puisne* incumbrance was bought in while there was such a *lis pendens* as will make Saunders a purchaser with notice.” (a)

\*49. In a subsequent case, the question was, whether \*110 a mortgagee, who lent a further sum upon bond, should be allowed to tack it to his mortgage, in preference to other creditors, under a trust for payment of debts, created by the will of the mortgagor.

Lord Hardwicke said he had considered this case; and was inclined to think the mortgagee should not be allowed to tack the bond to the mortgage. With regard to the heir of the mortgagor, the reason why he should not redeem the mortgage, without paying the bond likewise, was to prevent a circuitry; because \*the moment the estate descended upon him, it \*111 became assets in his hands, and liable to the bond. A devisee too of the mortgaged premises, for his own benefit, was subject to the same rule, since the Statute of Fraudulent Devises, made in favor of bond creditors. But this was a devise in trust, for payment of debts, and the descent was consequently broke; so that he was of opinion the mortgagee could have no priority, with regard to his bond; but as to that, must come in *pro ratâ* with the rest of the creditors, under the trust. But if the counsel for the mortgagee had an inclination to be heard on this point, it should stand over.

The Attorney-General, who was counsel for the mortgagee, said he thought the point was too strong against his client to be maintained; and the Court thereupon made an immediate decree accordingly. (b)

50. Upon further directions, the only question was, whether Mr. Carforth, a creditor by mortgage of Andrew Whelpdale deceased, and also a bond creditor for £1834 3s. should tack his bond debt to his mortgage, against other specialty creditors.

Lord Thurlow. “The only reason why the mortgagee can

(a) *Morrett v. Paske*, 2 Atk. 52. *Vide* Ch. 5.

(b) *Heams v. Bunce*, 3 Atk. 630.

tack his bond to his mortgage is to prevent a circuitry of suits: it is solely matter of arrangement for that purpose; for, in natural justice, the right has no foundation. The principle explains the rule, and therefore it can go no further. The creditors, having another specific security, cannot give him in justice any priority for a lien that is subsequent. There being no foundation in justice, the only question is, whether the Court is in the practice of doing it; and it has not done it in any case but that of the heir, and merely to prevent circuitry." (a)

51. It has been long settled, that where a man makes *two several mortgages*, of two *several estates*, to the same person; and *one of them proves defective* in title or value; neither the mortgagor nor his heir will be admitted to redeem one, without the other.

52. The plaintiff's bill was to redeem a mortgage made by his father to the defendant, who by his answer insisted that the plaintiff's father had made him two several mortgages of several lands; that the plaintiff endeavored to defeat him of one of those mortgages by reason of an entail, and hoped that in equity he should redeem both or neither. But the Court said he  
112\* should \*redeem both or neither; and so, if one mortgage had been deficient in value, and the other mortgage had been worth more than the money lent upon it, the heir should not have been admitted to redeem the one without the other. (b)

53. The plaintiff, as assignee of a bankrupt, brought his bill to redeem a mortgage of the manor of N. made by the bankrupt to the defendant. The defendant by his answer insisted that he first lent the bankrupt £200 on a mortgage of a particular tenement; and afterwards lent him £300 on a mortgage of the manor of N. which was of better value than the money due; but the first mortgage was deficient in point of value. *Per Curiam.* If the plaintiff will redeem one, he shall redeem both. (c)

54. Lord Hardwicke appears not to have considered this case as an authority. But in Ambler's Reports the case of Titley v. Davis, before Lord Hardwicke, is cited, where two estates were separately mortgaged to the same person, by one and the same deed. The purchaser of the equity of redemption of one of the

(a) Lowthian v. Hasel, 3 Bro. C. C. 162. Hamerton v. Rogers, 1 Ves. jun. 513.

(b) Margrave v. Le Hooke, 2 Vern. 207.

(c) Pope v. Onslow, 2 Vern. 286.



estates brought a bill to redeem the estate which he had bought; and it was held by the Master of the Rolls that he was not entitled to redeem one only, but must redeem both; and the decree was affirmed by Lord Hardwicke.

Also the case of *Tribourg v. Lord Pomfret and Wilkins*, at the Rolls, 16 July, 1773. The plaintiff had two distinct mortgages, upon two different estates, made by the defendant Wilkins, by different instruments. Lord Pomfret had a second mortgage upon one of the estates only. Bill to be redeemed by Lord Pomfret and Wilkins, or to foreclose. Sir T. Sewell, M. R., decreed Lord Pomfret to redeem both mortgages, or to stand foreclosed. (a)

55. In a modern case, Lord Alvanley, when Master of the Rolls, said, that if two separate estates were mortgaged, by which he understood the legal estate absolutely, and at law irredeemably conveyed, the Court of Chancery would not interpose in favor of the redemption of one, without the redemption of both. *Pope v. Onslow*, followed by two modern cases, had settled the point, that as against the mortgagor or his assigns, and therefore he must suppose against all creditors, if there were two legal mortgages, which at law were become absolute (for that must be the principle) the mortgagee should insist on being redeemed \* as to both, or neither; and that Lord Kenyon had acted \* 113 upon this doctrine. (b)<sup>1</sup>

56. With respect to the time within which a redemption of a mortgage is allowed, the Courts of Equity have not established any positive general rule, when the length of possession of the mortgagee shall bar the mortgagor's right of redemption; as they consider that lands are usually mortgaged for much less than their real value, and that when a mortgagee receives his principal, interest, and costs, he cannot complain of any injury.

(a) *Ex parte Carter*, Ambl. 733. *Purefoy v. Purefoy*, 1 Vern. 29, and Mr. Raithby's note. *Willie v. Lugg*, 2 Eden, 788. *Roe v. Soley*, 2 Black. R. 726. \*

(b) *Jones v. Smith*, 2 Ves. jun. 372. *Ireson v. Denn*, 2 Cox, R. 425.

<sup>1</sup> In all the cases on the subject of tacking, it is to be observed, that there is a broad distinction taken between a bill to redeem and a bill to foreclose a mortgage. In the former case, redemption being asked for, on equitable grounds alone, the rule, that he who would have equity must do equity, applies, and tacking is allowed. But in a bill to foreclose a mortgage, the creditor applies on the ground of the mortgage debt alone. *Chase v. McDonald*, 7 Har. & Johns. 160; and see *Coote on Mortg.* 393; *Lec v. Stone*, 5 G. & J. 1; *Ogle v. Ship*, 1 A. K. Marsh. 287.

57. It being, however, extremely difficult for a mortgagee, who has long been in possession, to make out an exact account of the profits he has received, the Court of Chancery has laid it down as a rule, by analogy to the Statute of Limitations, 21 Jac. 1, that where the mortgagor has suffered the mortgagee to continue for *20 years in the quiet and uninterrupted possession* of the lands mortgaged, the right of redemption shall be presumed to be abandoned. (a)†<sup>1</sup>

(a) Tit. 31, c. 2.

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[† See Stat. 3 & 4 Will. 4, c. 27, § 28, whereby it is enacted that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt; unless in the mean time an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent, by, from or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with the interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.]

<sup>1</sup> [After twenty years possession by the mortgagee after condition broken, the mortgagor cannot redeem without special cause shown. *Ayres v. Waite*, 10 Cush. 72; *Blethen v. Dwinal*, 35 Maine, (5 Red.) 556; *Cromwell v. Bank of Pittsburg*, 2 Wallace, Jr. 569; *Robinson v. Fife*, 2 Ohio, N. S. 551; *Jarvis v. Woodruff*, 22 Conn. 548; *Morgan v. Morgan*, 10 Geo. 297.]

The rule adopted in Courts of Equity, in cases not affected by any statutory provisions, is thus summarily stated by Mr. Justice Story. "In respect to the time within

\* 58. In 13 Cha. II. upon a claim of redemption, it was \* 114  
pleaded that 20 years had elapsed since the mortgage had

which a mortgage is redeemable, it may be remarked, that the ordinary limitation is twenty years from the time when the mortgagee has entered into possession, after breach of the condition, under his title, by analogy to the ordinary limitation of rights of entry and actions of ejectment. (*Raffety v. King*, 1 Keen, R. 602, 609, 610, 616, 617; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 191, S. C. 4 Bligh, N. S. 1; *Corbett v. Barker*, 1 Anst. R. 138; S. C. 3 Anst. R. 755; *White v. Parnter*, 1 Knapp, R. 228, 229.) If, therefore, the mortgagee enters into possession in his character of mortgagee, and by virtue of his mortgage alone, he is for twenty years liable to account; and, if payment be tendered to him, he is liable to become a trustee of the mortgagor, and to be treated as such. But, if the mortgagor permits the mortgagee to hold the possession for twenty years without accounting, or without admitting that he possesses a mortgage title only, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in Equity, as it previously was in Law. In such a case the time begins to run against the mortgagor from the moment the mortgagee takes possession in his character, as such; and if it has once begun to run, and no subsequent admission is made by the mortgagee, it continues to run against all persons, claiming under the mortgagor, whatever may be the disabilities to which they may be subjected. (*Ibid.*) But, if the mortgagee enters, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor and the validity of the conveyance, which he takes. So that, if the conveyance be such as gives him the estate of a tenant for life only in the equity of redemption, there, as he unites in himself the characters of mortgagor and mortgagee, he is bound to keep down the interest of the mortgage like any other tenant for life for the benefit of the persons entitled to the remainder; and time will not run against the remainder-man during the continuance of the life-estate. (*Raffety v. King*, 1 Keen, R. 601, 609, 610, 616—618; *Corbett v. Barker*, 1 Anst. R. 138; S. C. 3 Anst. 755; *Reeve v. Hicks*, 2 Sim. & Stu. 403; *Ravald v. Russell*, 1 Younge, R. 19.)

"Similar considerations will, in many respects, apply to the right of foreclosure of a mortgagee. If he has suffered the mortgagor to remain in possession for twenty years after the breach of the condition, without any payment of interest, or any admission of the debt, or other duty, the right to file a bill for a foreclosure will generally be deemed to be barred and extinguished. (*Stewart v. Nichols*, 1 Tamlin, R. 307; *Christophers v. Sparke*, 2 Jac. & Walk. 223; *Trash v. White*, 3 Bro. Ch. R. 289; *Toplis v. Baker*, 2 Cox, R. 119. See also, *White v. Parnter*, 1 Knapp, R. 228, 229.) However, in cases of this sort, as the bar is not positive, but is founded upon a presumption of payment, it is open to be rebutted by circumstances. (*Ibid.*)" 2 Story, Eq. Jur. § 1028, *a*, 1028, *b*. And see 4 Kent, Comm. 187—190; Coote on Mortg. 541—547; 1 Pow. on Mortg. 360, Coventry's ed.; *Ross v. Norvell*, 1 Wash. 14; *Wells v. Morse*, 11 Verm. R. 9; *Dexter v. Arnold*, 3 Sumn. 152; *Stewart v. Nichols*, Tam. 307. [*Gould v. White*, 6 Foster, (N. H.) 178; *Richmond v. Aiken*, 25 Vt. (2 Deane,) 324; *Haskell v. Bailey*, 22 Conn. 569; *Evans v. Hoffman*, 1 Halst. Ch. 354; *Boyd v. Harris*, 2 Md. Ch. Decis. 210; *Roberts v. Welch*, 8 Ired. Eq. 287. The production of the mortgage and note having no evidence thereon of the payment of interest, raises a presumption that it has not been paid. *Olmsted v. Elder*, 2 Sandf. Sup. Ct. 325.] The supposed relation of the mortgagor to the mortgagee as his tenant, is not allowed to operate against the presumption of payment of the debt, resulting from his being permitted to remain in possession for a long period of time, without any demand of payment or other recognition

been forfeited; and that the land had descended to the heir at law of the mortgagee who had sold it. The plea was held good. (a)

59. In 29 Cha. II. upon a rehearing before Lord Keeper Bridgeman, assisted by Vaughan and Turner, Justices, concerning the redemption of a mortgage, made upwards of forty years before; the Lord Keeper declared that he would not relieve mortgages after twenty years; for that the statute 21 Jac. c. 16, did adjudge it reasonable to limit the time of one's entry to that period; and though matters in equity were to be governed by the course of the Court, it was best to square the rules of equity as near the rules of reason and law as might be. (b) <sup>1</sup>

60. Although there be a decree to redeem and account, yet if it be not prosecuted within twenty years, no redemption will be allowed.

61. Mr. St. John mortgaged certain lands in 1639 to Sir Richard Holford, who entered into possession of them. In 1663, a bill was brought by the mortgagor for redemption, and a decree obtained to redeem; but he dying, the suit was revived by his three daughters; and in 1672, another decree was obtained to account. The plaintiff having purchased from the daughters of St. John several estates—amongst the rest, their equity of redemption—brought his bill in 1700 to redeem; which was dismissed. (c)

62. The Court of Chancery, in further imitation of the Statute

(a) *Clapham v. Bowyer*, 1 Cha. Rep. 286. *Pearson v. Pulley*, 1 Cha. Ca. 102.

(b) *White v. Ewer*, 2 Vent. 340. *Aggas v. Pickerell*, 3 Atk. 225.

(c) *St. John v. Turner*, 2 Vern. 418.

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of the debt. After twenty years, this presumption may be made, even in Chancery. See *Christophers v. Sparke*, 2 Jac. & W. 234; *Cholmondeley v. Clinton*, Ibid. 179; *Cooke v. Soltau*, 2 Sim. & Stu. 154; *Giles v. Baremore*, 5 Johns. Ch. R. 545. In law, it is freely permitted to be made by the jury. *Jackson v. Wood*, 12 Johns. 242; *Collins v. Torrey*, 7 Johns. 278; *Jackson v. Hudson*, 3 Johns. 375; *Jackson v. Pierce*, 10 Johns. 414; *Jackson v. Pratt*, Ibid. 381; *Inches v. Leonard*, 12 Mass. 379; *Morgan v. Davis*, 2 H. & McHen. 9. If the mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainder-man will be barred of his right to redeem, after twenty years from such entry. *Harrison v. Hollins*, 1 Sim. & Stu. 471.

Whether length of time can bar a bill to redeem, in any other case than that of a mortgage in fee simple, *quære*; and see *Cowne v. Douglass*, *McCle. & Y.* 274.

<sup>1</sup> The possession must be an actual, quiet, and uninterrupted possession for twenty years, or a period of time sufficient to toll the right of entry at law. *Moore v. Cable*, 1 Johns. Ch. R. 385.

of Limitations, has determined that where the neglect to claim a redemption has arisen from *infancy*,<sup>1</sup> *coverture*, *imprisonment*, or *absence from the realm*, a possession of *twenty years shall not operate as a bar* to the redeeming a mortgage. (a) †

63. Alice Cornel being seised in fee of copyhold lands, she and her husband mortgaged them to Doctor Mountford for £30. The premises being forfeited by non-payment of the mortgage money, Doctor Mountford took possession thereof; and disposed \* of them to his wife for life, the reversion to \* 115 the defendant. Alice Cornel lived twenty-six years after the mortgage was made, and then died, leaving the plaintiff her son and heir, who brought his bill to redeem. The defendant insisted that the plaintiff ought not to redeem the mortgage, being of such long standing, and the premises having been conveyed away to a stranger. A redemption, was, notwithstanding, decreed, on account of the coverture of Alice Cornel. (b)

64. Where twenty years have elapsed after the mortgagee's entering into possession, and the time has *begun to run* against the ancestor, no legal disability in the heir will have any effect. (c) ‡

65. The plaintiff's father had mortgaged the estate in question in 1686. Ten years after, this mortgage was assigned over to the defendant, who by agreement was then let into possession, and had continued so ever since. The mortgagor had been several years dead, leaving the plaintiff's father, his eldest son and heir, of full age, who died in 1714, leaving the plaintiff, his son and heir, about twelve years of age, who brought his bill for an account, and to be let in to a redemption of the estate, of which the defendant had been in possession thirty-three years, so that he was greatly overpaid both his principal and interest.

Lord King dismissed the bill; and ordered it to be entered down as one of the reasons of such dismissal, that the plaintiff

(a) Tit. 31, c. 2.

(b) *Cornel v. Sykes*, 1 Cha. Rep. 193. *Price v. Copner*, 1 Sim. & Stu. 347.

(c) *Vide* tit. 31, c. 2.

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<sup>1</sup> An infant is allowed the twenty years after his arrival of age, in the absence of any other rule. *Lamar v. Jones*, 3 Har. & McHen. 328.

[† See Stat. 3 & 4 Will. 4, c. 27, § 28, and § 16, 17, 18.]

[‡ See Stat. 3 & 4 Will. 4, c. 27, § 17.]

had no remedy, by ejectment at law, to recover the possession, being barred by the Statute of Limitations; and he thought that a reasonable guide for a court of equity to follow; and though the plaintiff was an infant at his father's death, yet the twenty years had elapsed before, when there was no infancy; and therefore would afterwards run against infants. (a)

66. On a demurrer to a bill to redeem a stale mortgage, where the mortgagee *appeared by the bill* to have been in possession *above twenty years*, the Court held, the defendant need not plead the length of time, but *might demur*; that no redemption should be allowed in such case, unless there was an excuse by reason of imprisonment, infancy, or coverture, or by having  
116\* \* been beyond sea; and not by having absconded, which was an avoiding or retarding of justice. That there did not seem to be any certain time when the length of possession of the mortgagee should bar the mortgagor's right of redemption; but as twenty years would bar an entry or ejectment, abstracting from the excuses above mentioned, there was the same reason for allowing it to bar a redemption. The demurrer was allowed by Lord King. (b)

67. The same rule was agreed to in another case by Lord Talbot, who likewise declared it to be his opinion, though the case was afterwards compromised, that whereas the Court of Chancery had not in general thought proper to exceed twenty years, where there was no disability, in imitation of the first clause of the Statute of Limitations; so, after the disability removed, the time fixed for prosecuting, in the proviso, which was ten years, ought in like manner to be observed. (c)

68. As the difficulty of accounting is the principal reason that courts of equity will not allow a mortgage to be redeemed, after the mortgagee has been twenty years in possession, when that objection is removed, by an *account having been settled within twenty years* the right of redemption will be thereby preserved. †

69. The bill was to redeem a mortgage made in 1642. The mortgagee entered in 1650; three descents on the defendant's

(a) Knowles v. Spence, 1 Ab. Eq. 315.

(b) Jenner v. Tracey, cited 3 P. Wms. 287, n.

(c) Belch v. Harvey, 3 P. Wms. 287, n. 17 Ves. 99.

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[† See Stat. 3 & 4 Will. 4, c. 27, § 28, and § 16, 17, 18.]

part, and four on the part of the plaintiff; yet the length of time being answered for the greatest part, by infancy or coverture, and forasmuch as in 1686 a bill was brought by the mortgagee to foreclose, and an account then made up by the mortgagee, the Court decreed a redemption, and an account, from the foot of the account in 1686. (a)

70. A mortgage, after forty years' possession in the mortgagee, was held to be redeemable upon the foot of a stated account, with an agreement for turning interest into principal; and the decree was affirmed by the House of Lords. (b)

71. Length of time was insisted on by the defendant as a bar to the redemption of a mortgage, sought by the plaintiff's bill, it being twenty-nine years old. Lord Hardwicke said, he was not for encouraging redemption \* of mortgages of very \* 117 long standing: but then the Court must not wink so hard as not to allow it in any case. There was a pretence of coverture, which was no excuse, because if a woman became afterwards discover, the Statute of Limitations would run from that time; and though she should marry again, it would run after the second marriage. The next excuse was, that there was a tenancy by the curtesy: but there would be no bounds to a redemption, if that was an excuse; no mortgagee could ever be quieted in the possession; for it was of no consequence to the mortgagee, who had the equity of redemption; if they did not make use of that right, they should be barred. But though the mortgage was in 1718, in this case; yet no longer than 1730, (twelve years,) the clerk to the solicitor for the mortgagor had actually settled an account of what was due for principal and interest, in order to pay off the mortgage; and though no further proceedings had been, yet that should save the right of redemption. (c)

72. *Any act of the mortgagee, by which he acknowledges the transaction to be still a mortgage* within twenty years from the time when a bill is brought to redeem, will preserve the right of redemption: as if the mortgagee, by his will, disposes of the money, in case the mortgage be redeemed. (d) †<sup>1</sup>

(a) Proctor v. Cowper, 2 Vern. 377. (b) Conway v. Shrimpton, 5 Bro. Parl. Ca. 187.

(c) Anon. 2 Atk. 333. Barron v. Martin, 19 Ves. 327, S. C. Cooper, 192.

(d) (Hodley v. Healey, 6 Mad. 181. Rayner v. Castler, Ibid. 274.)

[† Stat. 3 & 4 Will. 4, c. 27, § 28.]

<sup>1</sup> A verbal recognition has been held sufficient. Shepperd v. Murdock, 3 Mur. 218.

73. A., in 1679, mortgaged lands to J. S., for a small sum of money, by an absolute conveyance and defeasance; soon after, A.'s necessities forced him to go abroad, where he died, and his heir knew nothing of the mortgage. In 1702, J. S. devised, that if the mortgage should be redeemed, the money should go in a particular manner. About sixteen years after the will, a bill was filed for redemption, to which was objected the great length of time; and that, by the settled rules of the Court, a mortgage should not be redeemed after twenty years.

Sir Joseph Jekyll held, that decreeing a redemption would be no wrong or hardship to the party, for he would have a greater interest than the law then allowed; that the not decreeing a redemption would be establishing a very great imposition; and though absolute conveyances and defeasances were formerly much used in mortgages, yet the same was left off as dangerous, 118\* \* by losing the defeasance, which was avoided by being in the same deed; that there was sufficient for redemption by the declaration in the will, where the mortgagee called it a mortgage. Lord Commissioner Gilbert was of the same opinion, and a redemption was decreed. (a)

74. In a modern case, Lord Thurlow said, that a man *taking notice by a will, or any other deliberate act*,<sup>1</sup> that he is a mortgagee, will take the case out of the rule, that a mortgagor shall not redeem after twenty years. (b)

75. Where the *mortgagee submits to be redeemed*, no length of time will operate as a bar to redemption.

76. A bill was brought to redeem, where the mortgagee had been in possession for twenty-five years. The defendant, as it was a family affair, submitted to be redeemed, notwithstanding the length of time. Lord Hardwicke said, he saw no color for redemption: but, on the defendant's submission, he decreed an account of what was due, and directed the plaintiff to pay the same in six months after the Master's report, whereupon the

(a) *Orde v. Smith*, Sel. Ca. in Cha. 9.

(b) *Perry v. Marston*, 2 Bro. C. C. 397. *Whiting v. White*, 2 Cox, R. 290. *Recks v. Postlethwaite*, Cooper, R. 161. *Hodley v. Healey*, 6 Mad. 181.

<sup>1</sup> As, by a recital in a deed. *Price v. Copner*, 1 Sim. & Stu. 347. Or, by any written memorandum. *Quint v. Little*, 4 Greenl. 495.



defendants were to convey; but, in default, the bill was to be dismissed without costs. (a)

77. Where *no particular time is appointed for the payment* of mortgage money, as in the case of *Welsh mortgages*,<sup>1</sup> a redemption will be decreed at any time; for it is the duty of the courts, both of law and equity, to effectuate the agreement of the parties.

78. On a bill to redeem a mortgage, the defendant demurred, because the mortgage was sixty years old: but the demurrer was overruled, it appearing to have been agreed that the mortgagee should enter and hold till he was satisfied, which was in the nature of a Welsh mortgage; and in such a case, length of time was no objection. (b)

79. One Davids made a mortgage of lands in Wales by lease and release, to one Reynolds and his heirs, for securing £300. The proviso was, that if Davids, his heirs or assigns, should, at Michaelmas, 1702, or any Michaelmas following, pay to Reynolds, his heirs or assigns, the sum of £300, and all arrears of rent or interest which should be then due, the conveyance was to be void.

It was decreed that this was in the nature of a conditional \*purchase, subject to be defeated on payment, by \*119 the mortgagor or his heirs, of the sums stipulated, on any Michaelmas-day, at the election of the mortgagor or his heirs; so that there was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law, like other mortgages; therefore there could be no equity of redemption, or any occasion for the assistance of a court of equity; but the plaintiffs might, even at law, defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any Michaelmas-day to the end of the world. (c)

80. This *perpetual right* of redemption may, however, be *lost by a subsequent agreement*.

81. Robert Hartpole, in consideration of £600, conveyed cer-

(a) Proctor v. Oates, 2 Atk. 140. Whiting v. White, Coop. R. 1. Hodle v. Healy, 1 Ves. & B. 53.

(b) Orde v. Henning, 1 Vern. 418.

(c) Howell v. Price, Prec. in Cha. 423. 1 P. Wms. 291.

<sup>1</sup> See *ante*, ch. 1, § 19, note.

tain lands by feoffment to Oliver Walsh in fee, subject to redemption, on payment of the money, at any last day of July or December. By a subsequent deed, Hartpole, in consideration of £2300, conveyed the premises in the former deed, and also other premises, to Walsh; and covenanted, for himself and his heirs, that whenever Walsh, his heirs or assigns, should give him eighteen months' notice in writing, requiring payment of the said £2300, that then Hartpole, his heirs or assigns, should pay the said £2300 within eighteen months after such request. After a period of one hundred years had elapsed, the heir of the mortgagor filed a bill for redemption, which was dismissed; and the decree of dismissal affirmed by the House of Lords, upon the ground, I presume, which is stated in the printed reasons; that the second mortgage deed, comprising all the mortgaged premises, put it in the power of the mortgagee or his representatives to ascertain and limit the time of redemption, by demanding the mortgage money; and such demand was admitted to have been made by the son of the mortgagee; therefore, from that time, the mortgage, whatever it was originally, became of such a nature, as made the equity of redemption liable to a foreclosure, either by a decree, or great length of time. (a)

82. Where lands are conveyed to a person till, *by perception of the rents and profits*, he is satisfied his principal and interest, no length of time will bar the redemption.

120 \* 83. \* One Palmer, by lease and release and fine, in 1699, conveyed two houses to Hambly and his heirs, until he should receive by the rents and profits thereof £50, then to the use of James Palmer for life, &c. The mortgagee entered and continued in possession upwards of forty years. Upon a question whether these two houses were then redeemable, Lord Hardwicke held they were, for that no bar arose from the length of time. He said there was no doubt, if this mortgage had been made in the common form, and subject to a forfeiture upon non-payment, the length of time would have been a bar; the courts of law and equity squaring their rules by the Statute of Limitations. But this was a conveyance of the inheritance for securing the sum of £50 advanced by Hambly, in trust that he should continue in possession till, by perception of the rents and profits, he should be satisfied his principal and interest. There never

(a) Hartpole v. Walsh, 5 Bro. Parl. Ca. 267.

could be a forfeiture under this deed, for the mortgagee was only in the nature of a tenant by *elegit*. As soon as his principal was satisfied by being paid off, or by perception of the rents and profits, the estate ceased in Hambly, and Palmer or his representatives might have maintained an ejectment. Nor would any bar have arisen from the length of time, unless the Statute of Limitations had run, by the mortgagee's continuing in possession twenty years after the money had been paid off. He said he did not see this case at all differed from a Welsh mortgage, though he did not say but there were circumstances which might create a bar, even in that case. But in common Welsh mortgages, on tendering principal and interest, they might come into the Court of Chancery at any time. (a)

\* Lord Hardwicke concluded with declaring that the \*121 plaintiff was entitled to redeem, upon the common terms of paying principal, interest, and costs; and to have an account of what had been received, and what remained due; and was not obliged to bring an ejectment for the possession, but should have a decree for it, after the mortgage was reported to be satisfied. (b)

84. Where the *mortgagor continues in possession*, [and no acknowledgment of the debt nor payment of interest by him for *twenty years*, the mortgagee will be barred upon the presumption of satisfaction. (c)]

85. In an early case it was decided that if the mortgagor was in possession of any part of the mortgaged premises, he should be admitted to redeem the whole, though the mortgagee was in possession of the other part for more than twenty years without any payment of interest by the mortgagor to him.]

\* 86. The case was *Rakestraw v. Brewer*, where a person in 1687 mortgaged a set of chambers in Gray's Inn, but continued in possession of the whole until 1700, at which time an order of the Bench was made, to deliver possession to the mortgagee, who entered into part; but, as to the remainder, the mortgagor continued in possession until 1708, leaving the plaintiff an infant. A bill was brought to redeem in 1726. It was so decreed at the Rolls, and affirmed by Lord King, who said nothing was

(a) *Yates v. Hambly*, 1 Atk. 860.

(b) *Doe v. Reed*, 5 Bar. & Ald. 232.

(c) *Christopher v. Sparke*, 2 Jac. & Walk. 223; and see *Cholmondeley v. Clinton*, 1 Jac. & Walk. 191. *Hall v. Doe*, 5 Bar. & Ald. 687.

more clear, than that if the mortgagor was in possession of any part, he should be permitted to redeem the whole, as being in possession thereof; and part he could not, separately from the whole; therefore he should redeem the whole. (a)

87. [Notwithstanding the preceding case, it does not appear to be settled, that because a mortgage is redeemable as to part of the premises, that, therefore, in no case shall the equity of redemption be barred as to another part. A contrary doctrine may be inferred, from a case cited by Lord Loughborough, C., in *Lake v. Thomas*, as follows: "There was a very long case, I think, before Sir Thomas Clark, about redemption. The title of the estate had come into two different hands; the part in the hands of one family was held irredeemable: as to the other, the mortgagee had kept accounts, and I think there was a 122\* \*devise of it as a mortgage: and the redemption was open as to that, after a number of years." ] (b)

88. Where *any species of fraud* has been practised by a mortgagee, at the time when the mortgage was made, a court of equity will interfere, and give relief, notwithstanding a possession of twenty years. (c)

89. Thus, in the case of *Orde v. Smith*, which has been already stated, it was expressed that the redemption should be with the mortgagor's own money. And the Master of the Rolls said, that the words in the defeasance, however fettered, signified nothing, where the money was to be repaid; for the borrower being necessitated, and so under the lender's power, the law made a benign construction in his favor. But this was a fraud in its creation, and in such case was redeemable after any length of time. (d)<sup>1</sup> †

(a) Select Ca. in Chan. 55.

(b) 3 Ves. 22.

(c) (*Marks v. Pell*, 1 Johns. Ch. R. 594.)

(d) *Ante*, § 73. 2 Crom. & Jer. 481.

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<sup>1</sup> Upon a decree to pay the mortgage debt, whether on a bill to redeem or a bill to foreclose, a short period is usually allowed to the debtor within which to pay the money. Where this period is not regulated by statute, the usual course in Chancery on a bill to redeem, is to allow six months after the debt is liquidated by the Master's report. *Novosielski v. Wakefield*, 17 Ves. 417; *Perine v. Dunn*, 4 Johns. Ch. R. 140. And this period will not, ordinarily, be enlarged, on motion for further time. *Ibid*; *Brinckerhoff v. Lansing*, 4 Johns. Ch. R. 65, 76; *Thorpe v. Gartside*, 2 Y. & Col. 730;

† [Where mortgagees become lunatic, their committees are empowered to convey by the Stat. 1 Will. 4, c. 60, § 3, under the direction of the Lord Chancellor.]

*Eyre v. Hanson*, 2 Beav. 478 ; *Faulkner v. Bolton*, 7 Sim. 319. But on a bill for a *strict foreclosure*, vesting the estate absolutely in the mortgagee, the time may be enlarged from six months to six months, upon equitable terms ; but this indulgence is not ordinarily granted in cases of a decree for the sale of the premises according to the usual practice of the Court. *Perine v. Dunn*, *supra*.

The rule to allow six months is also applied on a bill by an equitable mortgagee. *Parker v. Housefield*, 2 My. & K. 419.

## CHAP. IV.

## PAYMENT OF THE MORTGAGE MONEY AND INTEREST.

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| <p>SECT. 1. <i>The Personal Estate first liable.</i></p> <p>4. <i>Even in Favor of a Devisee.</i></p> <p>9. <i>A Disposition of the Personal Estate will not alter this Rule.</i></p> <p>10. <i>Nor a Charge on the Real Estate.</i></p> <p>15. <i>Lands devised for Payment of Debts are applied.</i></p> <p>19. <i>And also Lands descended.</i></p> <p>21. <i>The Personal Estate may be exempted. -</i></p> <p>25. <i>A Specific Gift of a Chattel will exonerate it.</i></p> <p>27. <i>The Personal Estate not liable.</i></p> <p>28. <i>I. Where the Debt was contracted by another.</i></p> <p>30. <i>Though there be a Covenant to pay it.</i></p> <p>34. <i>Or a Charge on the Real Estate.</i></p> <p>36. <i>II. Where an Equity of Redemption is purchased.</i></p> <p>41. <i>Unless the Purchaser makes the Debt his own.</i></p> <p>43. <i>Mortgages by Husband and Wife.</i></p> | <p>SECT. 53. [<i>Effect upon the Wife's right where the Equity of Redemption is not reserved to her.</i>]</p> <p>54. <i>Contribution between Tenant for Life and Remainderman.</i></p> <p>56. <i>Where Tenant for Life or in Tail pays off a Mortgage.</i></p> <p>58. <i>Interest.</i></p> <p>62. <i>Interest upon Interest not allowed.</i></p> <p>64. <i>Exceptions: — 1. Where a Mortgage is assigned.</i></p> <p>65. <i>2. Where there is an Account settled by the Parties.</i></p> <p>66. <i>Or settled by a Master.</i></p> <p>67. <i>3. Where the Time is enlarged.</i></p> <p>69. <i>4. Where the Parties are Infants.</i></p> <p>71. [<i>Interest by Mortgagee in Possession after Mortgage satisfied.</i>]</p> <p>73. <i>Who are bound to pay Interest.</i></p> <p>78. <i>Mortgage Money is payable to the Executor.</i></p> |
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SECTION 1. It is a rule in equity, where a person dies, leaving a variety of funds, one of which must be charged with a debt, that *the fund which received the benefit*, by contracting the debt, shall make satisfaction. It has, therefore, been long settled, that if a person borrows money on mortgage, and dies,

124\* leaving a real and personal\* estate, without specifically

charging either of them with the payment thereof, his *personal estate shall be first applied* towards the payment of the mortgage; because it was increased by the money borrowed.<sup>1</sup> The executor of a mortgagor is, therefore, in general, compellable to redeem a mortgage for the benefit of the heir, even though there be no covenant in the mortgage for the payment of the money. (a)

2. A father and son joined in a mortgage of the father's estate; the father received the money, and the son conveyed in consideration of 10s. There was no covenant in the mortgage for payment of the money. The bill was brought to make both the real and personal assets of the father and son liable to the mortgage money, the estate mortgaged being subject to prior incumbrances.

Lord Hardwicke said it had been determined that the personal assets were liable, though there were no covenant in the deed for payment of the mortgage money, because there was a debt contracted by the borrowing.<sup>2</sup> This demand went a step further, seeking to charge the real assets of the father, in the hands of the son, which were not liable in the hands of the heir, even by a bond or covenant of his ancestor, unless the heir was specially named. As to the son, his assets were no way liable, for he conveyed only in consideration of 10s., and had no part of the money, consequently was no debtor; and neither his real nor personal assets were bound. (b)

3. In the case of *Howell v. Price*, it was contended that the personal estate of the mortgagor was not subject to the payment of the mortgage, because it was a conditional sale between the mortgagor and mortgagee, that the mortgagee should have the land until the mortgagor or his heirs should repay the money; that it was in the election of the mortgagor whether he would pay it or not; nor would any action of debt lie for it. The Court, however, decreed, that the personal estate of the mortgagor should be applied in payment of the mortgage. (c)

4. The *personal estate is liable* to the payment of a mortgage

(a) *Cope v. Cope*, 1 Salk, 449. *Bateman v. Bateman*, 1 Atk. 421. *Lanoy v. Athol*, 2 Atk. 444. *Lord Portsmouth v. Lady Suffolk*, 1 Vez. 31.

(b) *Lloyd v. Thursby*, 1743, MS. Rep.

(c) *Ante*, c. 3, § 79.

<sup>1</sup> See 1 Story, Eq. Jur. § 571—577, where this subject is fully treated.

<sup>2</sup> See *ante*, ch. 1, § 15, note.

*in favor of a devisee, or hæres factus, as well as in favor of an hæres natus, although there be no bond or covenant for payment of the mortgage money.*

5. Thus, it was declared by Lord Nottingham, in 1681, “that not only the heir, in case he be charged with debts of the 125 \* \* ancestor, but a devisee of the land, shall be unburdened too of a debt lying on the land, by the personal estate in the hands of the executor or administrator; and so shall a devisee of a mortgage.” (a)

6. Thomas King having freehold and copyhold lands, mortgaged the copyhold for £350. He afterwards devised the same copyhold to his nephew and his heirs; and, after all his debts paid, he devised the rest of his estate, real and personal, to his son and his heirs, and appointed him his executor. It was determined by Lord Talbot, that the personal estate of the mortgagor was liable to the payment of this mortgage, though there was no covenant or bond for the payment of it. (b)

7. Lord Hardwicke states it to have been determined by Lord Nottingham, that a devisee of part of the real estate was entitled to have a mortgage paid off out of the personal estate, and that this opinion had been followed ever since. (c)

8. Though the estate in mortgage be devised, subject to the incumbrance, yet the personal estate will be applicable to the payment of the mortgage, especially when there are any circumstances indicating such an intention. (d)

9. It has been stated in title 1, s. 58, that *a testamentary disposition of the personal estate will not exempt it from the payment of debts; therefore, in a case of this kind, the heir or devisee will be entitled to have a mortgage paid off out of the personal estate.*

10. Where a testator *charges his lands with the payment of his debts*, this will *not exonerate his personal estate*; for such a charge can only be intended for the purpose of creating an additional fund, in case the personal estate should not be sufficient.†

(a) *Popley v. Popley*, 2 Cha. Ca. 84. 1 Vern. 36. Cases Temp. Finch, 401.

(b) *King v. King*, 3 P. Wms. 359.

(c) 2 Atk. 426.

(d) *Serie v. St. Eloy*, *infra*, § 16.

† [On the primary liability of the personal estate to, and also its exoneration from the payment of debts and legacies, see Roper's *Legacies*, edit. 1828, Vol. I. ch. 12, s. 3, p. 595.]



11. Lord Hardwicke has said—"I know of no authority where the words, I make my real estate liable to pay my debts, will exempt the personal estate, without any special exemption of personal estate; nor has the Court ever said that personal estate shall be applied only to pay legacies, and not the debts; nor will making a particular estate in land liable to pay debts exonerate the personal estate, because it is the natural fund for \* payment of debts. Suppose a man devises a real estate \* 126 liable to the payment of debts, and subject to those debts gives it over to another, or what remains after payment of debts, which is all one; if there are not express words to exempt the personal estate, it shall be first applied." (a)

12. Where a *term of years is created* for the purpose of raising a *fund to pay debts and legacies*, yet this will *not exempt the personal estate* from being first applied in payment of a mortgage.

13. A person demised lands to trustees for five hundred years, upon trust for himself for life; after his death, upon trust, out of the rents and profits, to pay his debts, legacies, &c. It was decreed that the personal estate should be applied in exoneration of the real. (b)

14. It is the same where a provision is made, by way of trust of the inheritance of lands, to pay debts; the personal estate will still be liable; therefore, where lands were devised to a person for payment of debts, the personal estate was directed to be first applied for that purpose. (c)

15. Where the *personal estate is deficient*, the money arising from the sale of *lands devised for payment of debts*, will be applied in satisfaction of a mortgage.

16. A testator began his will by directing that his executor should pay and discharge all his just debts, and that he should raise sufficient to pay the same. He then devised his manor at Godalmin to Jane Styles and her heirs, at the age of twenty-one, or marriage; subject, nevertheless, to the incumbrances that were or should be upon it at the time of his decease. In the mean time, and until she should arrive at her said age or marriage, the rents, issues and profits to be paid by his executor into the hands of her father or mother. He then devised to his

(a) 3 Atk. 202. 2 Ves. 447. 11 Ves. 186.

(b) Cook v. Gwavas, 9 Mod. 187. 1 Bro. C. C. 454. 1 Mer. 227.

(c) Lovel v. Lancaster, 2 Vern. 182.

brother, Leonard Child, and his heirs, the reversion of the manor of W., subject, nevertheless, to the payment of such of his debts as should remain unpaid. All the rest of his real and personal estate, not therein before specifically disposed of, he devised to John St. Eloy, his heirs and assigns, in trust to sell the same, and thereout to pay his debts and general legacies. In case there should be any deficiency, and that any of his debts and legacies should remain unpaid, then he charged the same on the reversion and inheritance of the manor of W.; and thereby directed the said Leonard Child and his heirs to pay off the same.

127\* \* It was said that the lands in Godalmin, which were mortgaged for £500 to one Hunt, being devised subject to the incumbrances thereon, the devisee must take them *cum onere*, and be contented to pay off the mortgage.

Sir J. Jekyll said, the devise of the estate, subject to the incumbrance, was no more than what was implied, for the testator could not do it otherwise. When the testator devised other lands to pay his debts, that must be intended all his debts; consequently the debt by mortgage of Godalmin was part of those debts, which were to be paid off out of the money arising by the sale of the trust estate. This was the stronger by the testator's having appointed the rents and profits, during the infancy of his god-daughter, to be paid to the infant's father, for the sole use of the infant, which was as much as to say, that they should not go or be applied in discharge of the mortgage; and although the infant by her own bill had submitted to pay off the mortgage, yet his Honor said he must take care of her, and not suffer her to be caught by any mistake of her agent; wherefore the infant was directed to amend her bill.

The bill having been amended, and the cause coming on to be heard before Sir J. Jekyll, he declared that all the debts and general legacies of the testator were by his will to be paid out of his personal estate, and the real estates devised to the defendants, St. Eloy and Child; and that the mortgage of the defendant Hunt, on the estate devised to the plaintiff, was to be taken as one of those debts. This decree was affirmed by Lord King. (a)

17. A testator devised his lands at H. to Richard May in tail, remainder over. Those lands being then in mortgage for £1300, he devised other lands to Thomas May, subject, however, to the payment of his debts, in case his personal estate, and other estates devised for that purpose, should not prove sufficient to satisfy all his debts. Lord Hardwicke decreed that the £1300 must be paid, as the debt of the testator, out of the personal estate; or, if that should prove deficient, then out of the real estate so devised. (a)

18. Sir R. Worsley, being seised in fee of several estates, subject to mortgages which he had made; and being also seised in fee of estates in the Isle of Wight, made his will, reciting himself to be seised of the estates, subject to incumbrances, and devised the mortgaged estates in strict settlement; and the \*estates in the Isle of Wight to trustees for twenty-one \*128 years, in trust to pay several annuities; after payment thereof, to pay *all his bond and book debts*, in case his personal estate should not be sufficient to pay the same, and also all his legacies and annuities; subject thereto, and such other payments as they should make to any other person, by virtue of, or in pursuance of, *any deed by him alone, or together with his son, executed*. He directed the trustees to account for all the remainder of the rents and profits of the premises, so devised to them for the said term, to his cousins J. and R. Worsley.

Lord Thurlow decreed that the rents and profits of the trust term should be applied in discharge of the mortgages. He said he made his decree with great reluctance, from finding himself obliged to charge the trust term of twenty-one years with the payment of the incumbrances. Had the question stood upon the words *bond and book debts* only, it might have admitted of some doubt; but the misfortune was, that by the subsequent clause, Sir Robert had directed his trustees to pay all his debts, annuities, legacies, &c.; and a still greater misfortune was, that he had made his executors executors in trust, and had made the term a joint fund with his personal estate. (b)

19. Where an *estate in mortgage is devised*, and another *estate descends* from the testator to his heir, the *estate descended* shall be applied in payment of the mortgage.

(a) *Bartholomew v. May*, 1 Atk. 487.

(b) *Tweedale v. Coventry*, 1 Bro. C. C. 240.

20. A person being seised in fee of some lands which were mortgaged to A, who, about a month before the mortgage made, had taken a bond for the same debt, and having also a lease for three lives, devised the mortgaged premises, and the lease, to his wife, whom he also made his executrix. After his will made, he purchased the reversion of the estate which he held in lease, whereby the devise became revoked, as to those lands; and died without any republication or alteration of his will.

Upon a bill brought by the heir at law for a delivery of the deeds and writings, and an account of the mesne profits of the estate descended to him, it was insisted for the wife, who was devisee of the mortgaged premises, that the personal estate being deficient, she might, as *hæres factus*, throw the burden upon that part of the real estate descended to the heir at law, by the mere accident of her husband's purchasing the fee after the will made;

129\* who, being ignorant of the operation of law, intended her the \*benefit of all his real estate; and that she should therefore hold the estate devised to her, free from any charge; and the heir to satisfy the mortgage out of the real assets descended to him: pretending that this was originally a bond debt, and the mortgage but a subsidiary or collateral security.

Lord Hardwicke at first was clearly of opinion that she had no right to be relieved against the heir; that the bond and mortgage were but one security given for one and the same debt; and that whether the estate descended to the heir by an omission of the testator to dispose of it, or from the devise being void, or from any other accident, it was still the same thing. He said that all the cases where the *hæres factus* had the assistance of the Court to exonerate his estate were against the representatives of the personal estate, thereby to put him on an equal foot with the heir at law, but not to give him the preference as in this case, where the competition was between one part of the real assets and the other; that this was the first instance wherein the heir was attempted to be charged; that the devisee must take the estate as it came to her, charged by the testator; and though, where but part of the estate was devised away, and the other part descended to the heir at law, the creditor might, upon his bond and covenant, sue the heir at law alone, without naming

the devisee, yet that was because the descent was not entirely broke, as it was where the whole was devised away.

The cause was reheard; and Lord Hardwicke, after having taken a year to consider it, changed his opinion, and gave judgment in favor of the devisee; concluding in the following language:—"I have, after most mature deliberation, \* 135 altered my opinion in this case, which I am not ashamed to own, since not to confess an error is much worse than to err. The appearance of hardship against the heir struck me at first; but this hardship, in a particular instance, must not prevail upon the Court to break into its rule for marshalling assets. And though this may be called a new case, not strictly within any rule, nor warranted by any former precedent; yet must we remember that neither law nor equity consists merely of cases and precedents, but of general rules and principles, by the reason of which the several cases coming before courts of justice, are to be governed, without distinction or exemption of any particular case, from hardships peculiar to it. But there is one circumstance in the present case which frees my mind from any uneasiness on account of hardship upon the heir, which is, that the charging the lands descended to him will bring things nearer to the testator's intent, the whole being intended to go to the devisee; and what has come to the heir is the mere effect of chance, the accidental revocation of the will by an act in law, the purchase of the reversion \* of one estate after the will \* 136 made, and the testator's dying without any republication of it. I declare, therefore, that the former decree must be reversed, and that the devisee has a right to have the lands descended upon the heir applied towards satisfaction of the mortgage." (a)

21. It is, however, in the power of a mortgagor, *by his will*, to exempt his personal estate from the payment of money due by him upon mortgage, by substituting his real estate in its stead.

22. L. S. devised all his manors to trustees and their heirs, upon trust, immediately out of the rents and profits, or by sale or mortgage of the premises, or any part thereof, to raise and levy money for payment and satisfaction of all his just debts; if there should be a surplus of lands or money, that to be to his sis-

(a) Galton v. Hancock, 2 Atk. 424. Barnewell v. Lord Cawdor, 3 Mad. 453.

ters jointly, and their heirs; and gave all his personal estate to his wife, whom he appointed executrix. Lord Somers took notice that the debts were more than the personal estate amounted to;† therefore the testator must have meant that his wife should have it exempt from debts, or he meant nothing; and there was in this case no room to make a different construction. (a)

23. A testator devised his real estate to be sold, and the money to arise from the sale to be applied to pay mortgages and other debts, the residue to be added to his personal estate. It was contended that these words were not sufficient to exonerate the personal estate; that, in order to be so, there must be a destination, as to the estate to be sold, for the mere purpose of payment of debts; here was only a direction *in transitu*; for the words did not necessarily imply that the personalty was to be exonerated. The trustees were not under this devise bound to sell the estate immediately, yet the debts must be immediately paid; that must be out of the personal estate. Lord Kenyon, M. R., said he had no doubt about the case: the general rules were very clear that the personal estate was the fund first liable; and that the testator could not exonerate it without substituting  
137\* another fund. But there was no magic in \* words; no peculiar form of expression was necessary in order to exonerate the personal estate. If the intention of the testator was evident to exonerate the personalty, it must be exonerated; here the intention was beyond all doubt. The testator had directed the residue to be added to the personal estate; but according to the construction contended for, that would be gone. (b)

24. In a modern case, Lord Thurlow laid down the following rules respecting this doctrine: "1st. That the personal estate is liable, in the first instance, to the payment of debts. But in exception to this, it is agreed that the testator may, if he pleases, give his personal estate as against his heir, or any other representative, clear of the payment of his debts; and then it becomes

(a) *Bamfield v. Windham*, Prec. in Cha. 101. *Leman v. Newnham*, 1 Vez. 51.

(b) *Webb v. Jones*, 2 Bro. C. C. 60. 1 Cox, 245, S. C. See Sch. & Lef. 544, per Lord Redesdale.

† [Modern authorities have determined that an inquiry into the state of the property, with a view to ascertain the testator's intention, cannot be made, but that the intention must be collected from the will alone. *Amb.* 40; 1 Cox, 9; 1 Eden, 39, 43; 3 Ves. 113; 1 Mer. 220.]

a question, what is the mode of expression to give the personal estate, exempt from such payment; when the rule of law is, that such estate is first liable. Perhaps it might not have been unwise to have adopted the rule laid down in *Fereyes v. Robertson*, that the testator must use express words for that purpose; but it is impossible to abide by the opinion given in that case, consistently with the rules in other cases. The second rule is, that where there is a declaration plain, that shall stand in lieu of express words: this rule has been laid down so long, and acted upon so constantly, that, if other judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore, if there be a declaration plain, or manifestation clear, so that it is apparent upon the face of the will that there is such a plain intention, the rule then is, not to disappoint, but to carry such intention into execution; but should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is by law the first fund for the payment of debts." (a)

25. A mortgagor may also, by *specific gift of a chattel*, in his will, exonerate it from the payment of the money due on a mortgage; [for although the natural fund for the payment of debts is the personal estate, and the heir or devisee of the real is in general entitled to have the personal estate applied in exoneration of incumbrances affecting the former, yet the Court of Chancery \*will not permit such arrangement to take place \*138 when it would defeat legatees of their legacies.] (b) †<sup>1</sup>

26. A person being seised of a real estate in fee, which he had mortgaged for £500, and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died, leaving debts which would exhaust all his personal

(a) *Ancaster v. Mayer*, 1 Bro. C. C. 462. *Bunb.* 301. *Boote v. Blundell*, 1 Mer. 193, 231. *Greene v. Greene*, 4 Mad. 148. 1 Mer. 219, per Lord Eldon.

(b) *Ryder v. Wager*, 2 P. Wms. 329, 335, and 1 P. Wms. 730.

† [Upon the doctrine of marshalling of assets in favor of legatees, see 1 *Rop. Leg.* 806—846, ed. 1823.]

<sup>1</sup> The bequest in such case is evidence of the intent of the testator to exempt so much of his personal estate from the charge of the mortgage.

estate, except the leasehold given to his wife. The question was, whether there being, as usual, a covenant to pay the mortgage money, the leasehold premises devised to the wife should be liable to discharge the mortgage. Sir J. Jekyll, after taking time to consider of it, and being attended with precedents, decreed that, as the testator had charged the real estate by this mortgage, and, on the other hand, specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy, by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and although the mortgaged premises were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere*, as probably they were intended. (a)

27. The rule that the personal estate shall be first applied in payment of mortgages, is *founded on the principle that the debt was originally a personal debt of the mortgagor*, and the charge on the real estate merely a collateral security; but *where this principle fails, the rule does not apply*.

28. Thus, where the mortgage debt was *contracted by one person*, and the *lands so mortgaged descend to another*, his personal estate will not be liable to the payment of the money.

29. Thus, it is laid down by the Court of Chancery in the case of *Cope v. Cope*, (b) that if a grandfather mortgages his estate, and covenants to pay the mortgage money; and the land descends to his son, who dies without paying off the mortgage, leaving a personal estate and a son; the intermediate son's personal estate shall not be applied in payment of the mortgage; for the debt was not contracted by him, and so his personal estate derived no advantage from it.

30. A *covenant to pay* the money due on a mortgage, created by *another person*, will not make the personal estate of the covenantor liable in the first instance to the payment of it;  
139 \* such a covenant \*being only considered in equity as an additional security, which does not alter the nature of the debt.

31. Sir E. Bagot married the daughter and heir of Sir Thomas Wagstaff; and for raising part of her portion, Sir T. Wagstaff mortgaged part of his estate for £3500, and died, leaving Lady

(a) *Oneal v. Mead*, 1 P. Wms. 693.

(b) 1 Salk. 449.



Bagot his daughter and heir. The mortgagee, wanting his money, Sir Edward joined in an assignment of the mortgage, and covenanted that he or his wife would pay the money; in consequence of which a question arose, whether, by reason of this covenant, Sir Edward's personal estate should be liable to pay the same.

Lord Cowper declared, that this covenant by Sir Edward, did not oblige his personal estate to go in ease of the mortgaged premises; forasmuch as the debt being originally Sir Thomas Wagstaff's, and continuing to be so, the covenant, upon transferring the mortgage, was an additional security for the satisfaction only of the lender, and not intended to alter the debt. (a) <sup>1</sup>

32. George Evelyn the father, in pursuance of a power, mortgaged an estate whereof he was tenant for life, with remainder to his first and other sons, for raising £1500. Upon an assignment of this mortgage, George Evelyn the son, covenanted to pay the mortgage money. At his death, it became a question whether his personal estate should be applied in payment of the mortgage made by his father, as he had covenanted to pay it.

Lord King, assisted by Lord C. J. Raymond and the Master of the Rolls, was of opinion, that the personal estate of the son should not be applied to pay off the mortgage made by the father; forasmuch as the charge was made by George Evelyn the father, in pursuance of his power. That this, being the original debt of George Evelyn the father, though his personal estate, if any such were to be found, would be liable thereto, yet the son's personal estate ought not to be charged with the father's debt; and notwithstanding that the son did afterwards, on the assignment of the mortgage, covenant to pay the mortgage money, yet since the land was the original debtor, the covenant from the son should be considered only as a surety for the land. (b)

(a) Bagot v. Oughton, 1 P. Wms. 347. Donisthorpe v. Porter, 2 Eden, 162.

(b) Evelyn v. Evelyn, 2 P. Wms. 659.

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<sup>1</sup> So, if the purchaser or devisee of the mortgaged premises renders himself personally liable for the debt, the land, so far as relates to the marshalling of assets, is still the primary fund for payment of the debt, unless a contrary intent be clearly shown. *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 252. But the purchaser, by express directions in his will, or by dispositions or language equivalent to express directions, may throw the burden upon his personal estate. *Ibid.*

33. George Delaval, in 1722, mortgaged lands to W. C. to secure the repayment of £5000 with interest at 5 *per cent.*,  
 140 \* and \* by his will, made in 1723, he devised the lands to his nephew, G. Shafto, in tail male, remainder to the plaintiff in tail male, remainder over; and died soon after. In 1725, G. Shafto suffered a recovery to the use of himself in fee. The mortgagee calling for his money, W. Gibbons agreed to advance the £5000 at 4 *per cent.*, on an assignment of the mortgage; which was accordingly assigned to him, with a proviso for a redemption, on payment of the principal and interest at 4 *per cent.* And G. Shafto covenanted for himself, his heirs, executors, and administrators, to pay Gibbons the said principal and interest. In 1779, Shafto agreed to raise the interest to 5 *per cent.*; and by deed covenanted with the mortgagees, that the estate should remain as security for the £5000, with interest at 5 *per cent.*; and that he, his executors, &c. would pay such interest for the same. In January, 1782, G. Shafto died, the interest on the mortgage being then in arrear for about ten months. The bill was brought, among other things, to have the £5000 and interest paid out of the personal estate of G. Shafto, or at least the arrear of interest due at his death, and the additional 1 *per cent.* charged by the deed of 1779. But Lord Thurlow was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. He also thought that the interest must follow the nature of the principal; and that the contract for the additional interest, turning upon the same subject, must be in the nature of a real charge. (a)

34. Although a person should *charge his real and personal estate with the payment of his debts*; yet this will not render his personal estate liable to the payment of a mortgage created by another.

35. H. Lawson being seised in fee by descent of an estate at Cramlington, in the county of Northumberland, and of other estates both freehold and copyhold, devised his estate at Cramlington, which was subject to a mortgage contracted by an ancestor, and also another estate, to be sold; charged the same, and also all his personal estate, with the payment of his debts; and devised the residue of his real estate in trust for his brother, in strict settlement.

(a) Shafto v. Shafto, 2 P. Wms. 664, n.

The question was, whether the personal estate of H. Lawson, the testator, was liable to the payment of this mortgage; and \*it was decreed by Lord Thurlow that the personal \*141 estate was not liable.

On an appeal to the House of Lords, it was said—1. That by the established rules of equity the personal estate of the testator, whose will does not require such an application of it, is not to be applied in favor of those who claim his real estate, for the purpose of exonerating it from debts not originally contracted by such testator. Courts of equity distinguish between the debts of a testator and the debts of his estate. If the testator had received the money for which his real estate was pledged, his personal estate having received the benefit of the charge made upon the real estate, would in equity be liable to disincumber the real estate; but if the testator's ancestor created the charge, the testator's personal estate not having received any augmentation, at the expense of the real estate, could not in such a case be considered as a debtor to it; and this held equally whether the testator was seised in fee simple, or for a less estate, in the lands charged. This was the true principle of all the cases determined on the subject. The circumstance of the testator's having been personally liable, was often mentioned, as the ground of decisions which have directed the application of personal estate in exoneration of real; but there were many cases in which courts of equity had refused to direct personal estate to be so applied, though the testator had entered into covenants, or other personal engagements, to pay the debt for which the real estate had been pledged by his ancestors, or those through whom he claimed.

142 \* \*2dly. There was no express mention made of the debt in H. Lawson's will, nor any clause that afforded a proof that he considered it as his debt. The testator created a fund for the payment of *his* debts, legacies, and funeral expenses; but to apply that fund, or any part of it, in discharge of the mortgage debt, would be to dispose of it for the payment of a debt which certainly was not *his* debt, in contemplation of law. The decree was affirmed. (a)

36. *Where a person only purchases an equity of redemption,*

(a) *Lawson v. Hudson*, 1 Bro. C. C. 58. 3 Bro. Parl. Ca. 424. *Tankerville v. Fawcett*, 1 Cox, R. 237.

his personal estate will not be applied towards payment of the mortgage money; because it was not benefited by the loan.

37. Thus, it is laid down by counsel in the year 1681, as a doctrine fully established in Chancery, that where a person purchases an equity of redemption, in that case, although he purchases the land, subject to the debt due on the mortgage, and must hold the lands subject to such debt, yet *that* debt could never charge his person, nor did it in any sort become his own proper debt. (a)

38. John Aynesley purchased an estate from William Aynesley, which was subject to a mortgage for £2000. Not having paid it off, he devised the lands, together with other real estates, but subject nevertheless to the payment of all his debts, to his son, in strict settlement. The question was, whether the personal estate of John Aynesley should be applied in discharge of this mortgage.

Lord Thurlow said, this case was exactly the same with that of *Rochfort v. Belvedere*, 5 Brown's Parl. Ca. 299, where the House of Lords decreed that the personal estate was liable to the payment of the mortgage; but, notwithstanding, he said he was of a different opinion. The personal estate never was liable, nor was the party ever liable, to an action for recovery of the money; and therefore it ought not to be applied in payment of the mortgage. (b)

39. A covenant from the purchaser of an equity of redemption for payment of the mortgage money, will not make his personal estate liable in the first instance to the payment of it.

143\* \*40. Mr. Leigh, the testator, had purchased several estates subject to mortgages; with regard to one of which, he entered into a covenant for payment of the mortgage money, for the purpose of indemnifying a trustee; and as to another which was a part only of an estate, subject to a mortgage, upon splitting the incumbrance, both parties covenanted to pay their respective shares, and to indemnify each other.

Lord Hardwicke thought these covenants would not have the effect of making the mortgages personal debts of the testator,

(a) *Pockley v. Pockley*, 1 Vern. 37.

(b) *Tweddell v. Tweddell*, 2 Bro. C. C. 101. *Butler v. Butler*, 5 Ves. 536. *Ancaster v. Mayer*, ante, § 24.

they having been entered into for particular purposes; and declared his opinion accordingly in the decree. (a)<sup>1</sup>

41. But where it appears to have been the *intention of the purchaser* of an equity of redemption to make the debt his own, there his personal estate will be applied in payment of the money due upon it.<sup>2</sup>

42. A person agreed to purchase an estate which was in mortgage for £90, of which he covenanted to pay £86 to the mortgagee, and £4 to the owner of the estate. The purchaser died; and the question was, whether the heir at law was entitled to have the money paid out of the personal estate of the purchaser.

Lord Hardwicke was of opinion that he was. 1st. It was an express contract to pay, and the representative of the mortgagor might maintain an action for the money; and so might the mortgagee oblige the mortgagor to let him make use of his name to

(a) *Forrester v. Leigh*, cited 2 P. Wms. 664.

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<sup>1</sup> But if an estate descends, subject to a mortgage, and the heir creates a new mortgage for security both of the old debt and of another contracted by himself, fixing a new day of payment, he makes himself personally liable for both. *Lushington v. Sewall*, 1 Sim. 435.

<sup>2</sup> Where the mortgagor has conveyed the entire equity of redemption, absolutely and without warranty, the mortgaged premises constitute the primary fund for the payment of the debt; and the mortgagor is not a necessary party to a bill of foreclosure. *Bigelow v. Bush*, 6 Paige, 343; *Heyer v. Pruyn*, 7 Paige, 465. But where he has sold only a part of the equity of redemption, for good or valuable consideration, the entire residue is applicable in the first instance to the discharge of the mortgage, in favor of the *bonâ fide* purchaser. *Hartly v. O'Flaherty*, Lloyd & Goold, Cas. Temp. Plunket, 216; [*Howard Ins. Co. v. Halsey*, 4 Sandf. Sup. Ct. 565. It is a general principle that where the owner of land mortgaged for a debt, afterwards sells the equity of redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase-money, the latter becomes personally liable for the payment of the debt of the former in the first instance, and if the mortgagor is compelled to pay it he can recover it from the purchaser of the equity of redemption. *Flagg v. Thurber*, 14 Barb. Sup. Ct. 196; *Andrews v. Wolcott*, 16 Ib. 21; *Russell v. Pistor*, 3 Selden, (N. Y.) 171; see *Mellen v. Whipple*, 1 Gray, 317.

Where the estate of the mortgagor and the mortgagee coëxist in the same person a court of law will, when necessary for just purposes and to effectuate the proper intention of the parties, treat them as distinct interests. *Hutchins v. Carleton*, 19 N. H. 487. But where such a person, *i. e.*, one in whom the mortgage and the equity have united, takes and retains other security for the debt, *quære* how far he may be required by the debtor to apply the value of the land towards extinguishing the debt, before resorting to the other fund of which the general property remains in such debtor. *Smith v. Packard*, Ib. 575; *Jackson v. Tift*, 15 Geo. 557; *Vannest v. Latson*, 19 Barb. Sup. Ct. 604; *Walker v. Baxter*, 26 Vt. (3 Dean,) 710.]

recover the money. This was as strong a case as could well come before the Court.

2dly. It being agreed to be part of the purchase-money, the heir would, if there was nothing more in the case, be entitled to have the money paid out of the personal estate, as where one articles to purchase an estate, and dies before the purchase is completed. (a)

43. *Where a wife joins her husband in a mortgage of her own estate, and the money is applied for the husband's benefit, the personal estate of the husband will be first applied in payment of the mortgage.*<sup>1</sup>

44. Lord Huntingdon and his first wife joined in a mortgage for a term of years of her estate for £4500, by the execution of a power of appointment, to pay for a place of captain of the band of pensioners, for Lord Huntingdon, who promised 144 \* to repay the money out of the profits of the place, or otherwise. The mortgagee, together with the earl and countess, assigned the mortgage, subject to a proviso, that if the earl or countess, or either of them, should pay the money and interest, the term should cease. The earl afterwards paid off the mortgage, and procured the term to be assigned to a trustee for himself. The countess died; and the earl having married again, made his will, and devised the mortgage, with all other his personal estate, to his executors, in trust for his children by his second wife. The son of the first wife, who became Lord Huntingdon upon the death of his father, filed his bill to have the term assigned to attend the inheritance, which had descended to him from his mother.

Lord Keeper Wright declared he could not decree for the plaintiff, but upon the usual terms of redemption, on payment of principal, interest, and costs, and discounting profits.

The plaintiff appealed to the House of Lords, insisting that

(a) *Parsons v. Freeman*, Amb. 115. *Waring v. Ward*, 7 Ves. 332. *Earl of Oxford v. Rodney*, 14 Ves. 417.

<sup>1</sup> Where she joins with the husband in a mortgage for his debt, she is entitled, after the husband's death, to the rents and profits of her dower or other interest in the premises, until foreclosure. And if the debt is payable by instalments, and the amount which has become due can be raised by a sale of only a part of the premises, the income of her share of the residue will not be taken to satisfy the portion of the debt which is not yet payable. *Bank of Ogdensburg v. Arnold*, 5 Paige, 39.

he was in effect decreed to pay the mortgage debt, which was wholly a debt of the late earl, created to serve his particular occasions, and never was in any shape the debt of the late countess, nor did any part of the money come to her use.

\*It was ordered and adjudged, that so much of the \*145 decree as was complained of should be reversed; and that the premises in question should be discharged from the demands of the respondents, and the term assigned, as the appellant should direct. (a)

45. Mr. Alexander and his wife, who was the daughter and heir of one Dayly, made a mortgage of the wife's estate. The husband covenanted to pay the money; but the equity of \*redemption was reserved to them and their heirs. Mr. \*146 Alexander, the husband, died; and made the defendant his executor, the wife surviving. After a decree to account, the question was upon exceptions to the Master's report, whether the mortgage money should stand charged upon the land, or the land be exonerated out of the husband's personal estate. *Per Cur.*—The husband having had the money, is in equity the debtor, and the land is to be considered but as an additional security; and so decreed it, according to the judgment in the House of Peers, in the case of Lord and Lady Huntingdon. (b)

46. The wife joined with her husband in a fine to raise £400 out of her own estate, for the use of her husband, to equip him as an officer in the army. The question was, whether the husband's personal estate should be applied to exonerate the mortgage. *Per Cur.*—The wife subjected her estate to supply the wants of her husband. It must be taken to be a debt due from the husband; and to be paid out of his personal estate, if he be able; but all other debts should be first paid. (c)

47. Lord Hardwicke has said—"Suppose a husband has a mortgage upon his estate, and a wife joins with him in charging her own; if she survives him, though her estate is liable to the mortgagee, yet in this court her estate shall be looked upon only as a pledge; and she is entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate." (d)

(a) *Huntingdon v. Huntingdon*, 1 Ab. Eq. 62. 2 Bro. Parl. Ca. 1.

(b) *Pocock v. Lee*, 2 Vern. 604.

(c) *Tate v. Austin*, 2 Vern. 689. 1 P. Wms. 264.

(d) 2 Atk. 384. 3 Bro. C. C. 545. 1 Vez. 252.

48. [But where the charge on the wife's estate is *not the debt of the husband*, her claim to exoneration fails.

Thus, where the estate descended to the wife subject to a mortgage, and the mortgage was assigned, the husband covenanting in the assignment to pay the mortgage money; it was decided that, the debt not being the husband's, his personal assets should not exonerate the wife's estate; the husband's covenant was only considered an additional security. (a)]

49. So also, where money is borrowed on the wife's estate, *partly to pay her debts*, and *partly for the husband's use*, the husband will not be required to indemnify his wife's estate against any part of it.<sup>1</sup>

50. On a bill to have a sum of £1100 paid by the defendant, as having been borrowed by him on the security of his late wife's estate, Lord Hardwicke said, the general rule was, that where the husband borrowed a sum of money for his own use, and 147 \* the \*wife joined in a mortgage of her jointure for repayment of it, her estate should be a creditor on the husband for that sum. So it was where there was no settlement, and the wife mortgaged her estate of inheritance to raise money for the husband. But there was no instance where, at the time of such mortgage or security made, if at the same time a settlement was made either before or after marriage, that the husband was considered as answerable to the wife's estate, for the money borrowed; that was an exception out of the general rule; otherwise it would be very inconvenient to men that were going to be married, and, nine times in ten, contrary to the intention of the parties. Besides, in this case, the greatest part of the money borrowed was to pay off a debt due from the wife *dum sola*; and it was against equity to say that the husband ought to indemnify the wife's estate against that debt. The husband,

(a) Bagot v. Oughton, 1 P. Wms. 347.

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<sup>1</sup> A feme sole made a mortgage, and afterwards married. The mortgage was then assigned, the husband joining in the transfer, and covenanting to pay the money; which, during the coverture, he paid in part. By his will he made a disposition of the mortgaged premises, and died, leaving the wife; who afterwards filed a bill to redeem the mortgage, claiming to be entitled by survivorship. The redemption was decreed upon the terms that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property, in reduction of the mortgage debt. Pitt v. Pitt, Turn. & Russ. 180.



it was said, was liable to the wife's debts, contracted before marriage; and so he was: but if he was not sued in her lifetime, he was not liable even at law, unless she had a separate allowance, and left any thing behind her, which he possessed as her executor.

It was said, part of this money was paid to the husband and wife, not in order to discharge the wife's debts, but to the husband's use; that payment to the husband and wife was payment to the husband. The Court would not, however, set up two presumptions, but adhere to one only. As the greater part was manifestly not intended to be accounted for by the husband to the wife's estate, so he should take it that the rest was not. It was said the husband gave bond for payment of the money, and performance of covenants; that the creditors might have sued him on this bond, and then he must have come as plaintiff into the Court of Chancery, to be repaid out of the wife's estate, which the Court would not have done; and there was no more reason for it then; and he was of opinion the Court would have relieved him. Therefore decreed the defendant only to keep down the interest for life, &c. (a)

51. If, however, it appear *not* to have been *the intention of the wife to stand as a creditor* for the mortgage money, the husband's personal estate will not be liable.

52. A bill was filed by the widow of William Clinton, to have her estate exonerated, by the estate of her husband, from a mortgage made by the husband and plaintiff, for which he received \*the money. The facts were, that in 1746, the \*148 plaintiff intermarried with William Clinton, who was then in indifferent circumstances, and received from her father a proper fortune. In 1762, she became entitled to some real estates; and, in order to raise money for her husband, she joined with him in a mortgage of those estates. After the death of Clinton, the plaintiff filed her bill to have her estates exonerated, to which the devisee of the personal estate and executor of her husband put in an answer, in which they contested the plaintiff's right, on the ground that it was a voluntary gift, by the plaintiff to her husband, in order to enable him to complete a purchase

(a) *Lewis v. Nangle*, Amb. 150, S. C. 2 P. Wms. 664, *in notis*. See *Kinnoul v. Money*, 1 Ves. 186, and 1 Rop. Husb. and Wife, c. 4, § 2.

which had been made at her request; and that upon settling some accounts, the matter respecting the mortgage had been fully entered into, on which occasion the plaintiff admitted she had been advised to claim the mortgage money, but had relinquished that idea, and did not desire it, and promised to discharge the same, and accept the provision made for her by her husband's will.

Lord Thurlow admitted parol evidence of the wife's having relinquished this demand against her husband; and dismissed her bill. (a)

53. *Where lands are in settlement*, and the husband and wife join in a mortgage of them, if the deed creating the security is no more, in effect, than *a simple charge on the lands*, and does not alter the limitations further than is necessary to create the charge, *the right of redemption*, although it be reserved by the deed to the husband and wife, or either of them, their or either of their heirs, *belongs only to those who are entitled under the settlement*, and not to the heirs of the husband, if he survives the wife. But where the wife's lands, on her marriage, were limited to the use of the husband and wife successively for life, remainder to their issue, with the reversion to the wife and her heirs, and the deed contained a power of revocation and new appointment, and the husband and wife made a mortgage for a term of years, and afterwards executed a deed of further charge, and levied a fine, and thereby limited the lands, subject to the term to themselves for life, with remainder to the heirs of their bodies, and for default of such issue to the right heirs of the survivor, it was held, that, as there was, on the face of the deed, a clear manifestation of an intention to effect a change of the beneficial interest, the husband and his heirs (the wife being dead 149 \* \* and there being no issue) was entitled to the equity of redemption. (b)

54. Where an estate in mortgage was vested in a person *for life*, with *remainder to another in fee*, the rule formerly was, that the tenant for life should pay one third, and the remainder-man the other two thirds, of the money due on the mortgage. [But the rule respecting contribution by *the tenant for life, of one third*

(a) *Clinton v. Hooper*, 3 Bro. C. C. 201.

(b) *Jackson v. Innes*, 1 Bligh, 104, in which all the authorities on this point are referred to. *Ruscombe v. Hare*, 6 Dow, 1. See *Rop. Husb. & Wife*, vol. 1, c. 4, § 3.

of the principal money, is now exploded.<sup>1</sup> *He is bound, however, to keep down the interest, and beyond that, to contribute, in some cases, in proportion to the benefit he derives from the liquidation of the mortgage.*] And where the mortgage is not redeemed during the life of the tenant for life, there the whole of the money must be paid by the person who becomes possessed of the remainder, who cannot compel the representatives of the tenant for life to contribute any thing towards the payment of the mortgage money. (a)

(a) *Ballet v. Spranger*, Prec. in Cha. 62. *Clyatt v. Battison*, 1 Ab. Eq. 117. 5 Ves. 107. *White v. White*, 4 Ves. 33. 9 Ves. 554. *Montfort v. Lord Cadogan*, 17 Ves. 485. 19 Ves. 635. 2 Mer. 3. *Allan v. Backhouse*, 2 Ves. & Bea. 70; and see Roper on Leg. vol. 1, c. 4, § 6, 3d ed.

<sup>1</sup> On the subject stated in the text, Mr. Coventry has the following note:—"This rule, as to the tenant for life paying a gross sum, is now exploded as unreasonable; *Penrhyn v. Hughes*, 5 Ves. 107; *White v. White*, 4 Ves. 33; and the following more equitable one adopted in its stead, viz., *that the tenant for life shall contribute beyond the interest in proportion to the benefit he derives from the liquidation of the mortgage debt, and the consequent cessation of annual payments of interest during his life*, (which, of course, will depend much on his age, and the computation of the value of his life.) *And a reference will be directed to the Master to inquire what proportion of the capital he ought to pay.* *Allan v. Backhouse*, 2 Ves. & Bea. 70. See also *Nightingale v. Lawson*, 1 Bro. C. C. 440; *Shrewsbury v. Shrewsbury*, 1 Ves. jun., 233, 234; *Jennings v. Looks*, 2 P. Wms. 278; *Jones v. Selby*, Pre. Ch. 289; *Lloyd v. Johnes*, 9 Ves. 37; *Montford v. Cadogan*, 17 Ves. 485. This subject was much discussed at the Rolls, in the case of *White v. White*, 4 Ves. 24, and 5 Ves. 554, and afterwards before the Chancellor, on appeal, when the decision of the Master of the Rolls was as to the main points affirmed. 9 Ves. 554. Lord Alvanley, M. R., is reported to have said, that the tenant for life ought to pay nothing but the interest. The present Lord Chancellor, however, when that case came on upon appeal, disapproved of that doctrine, on the ground of the possible inequality; and stated the rule as an *obiter dictum* to be, that in general cases, where the tenant for life is bound to pay any thing beyond the interest, he is bound to pay in proportion to the benefit he *de facto* takes under the transaction; and that the remainder-man ought also to pay with reference to his proportion of the benefit. But his Lordship would not finally decide the question then, it being in that case unnecessary to give a definite opinion on the subject. The rule, however, as above stated, was subsequently acknowledged and acted on, in the case of *Allan v. Backhouse*, *ubi supra*, and such must now be taken to be the standing doctrine of the Court." See 1 Pow. Mortg. 312, 313, Rand's ed.; 3 Pow. Mortg. 921, note (n). See also 1 Story, Eq. Jour. § 487, 488, 488, a; *Swaine v. Perine*, 5 Johns. Ch. 482; *Clyatt v. Batteson*, 1 Vern. 404; *Thynn v. Duvall*, 2 Vern. 117; 4 Kent, Comm. 74, 75. The same general principle was administered in *Foster v. Hilliard*, 1 Story, R. 77; where a sale of an estate was made by the tenant for life and the person in remainder; and it was held, in the absence of countervailing circumstances, that the purchase-money should be divided according to their respective interests, calculated according to the value of the estate of the tenant for life, by the common tables.

55. If a tenant for life of an equity of redemption pays off the mortgage money, and procures the term to be assigned to a trustee for himself, makes improvements, and dies, and afterwards the remainder-man comes to redeem, [the rule formerly was that] the representatives of the tenant for life should have an allowance of two thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life. [But modern decisions seem to have altered this rule, and to have allowed the tenant for life and the mortgagee making lasting improvements, the whole of the principal money expended, and interest from the period of the advances; but of course the representatives of the tenant for life cannot claim interest of the money paid in discharge of the mortgage debt, for that the tenant for life was bound to keep down.] (a)

56. *Where a person who is tenant for life of an estate that is mortgaged pays off the mortgage money, his personal representatives will be entitled to call on the remainder-man for all the principal money so paid; but where a tenant in tail pays off a mortgage, the presumption is, that this was done in exonération of the estate, unless the contrary appears.* (b)

57. A, tenant in tail of an equity of redemption, under his father's will, paid off a mortgage secured on the estate, by a term for years, but did not procure an assignment of the term, and afterwards devised the lands. The remainder-man  
150 \* claimed \* the lands, the estate tail not being barred, discharged of the incumbrance.

Lord Hardwicke held, that there being a term for years in the mortgagee, which stood out in point of law, as it did before, no assignment in law having been made thereof, none of the parties before the Court had the legal estate, for a conveyance of which the plaintiff came; therefore, *that* conveyance must be upon equitable grounds. So far as it appeared, tenant in tail paid it off with his own money. He might have taken an assignment of the term, either in trust to attend the inheritance, which would have ended the question, or in trust for himself, his executors, or administrators; which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit

(a) *Newling v. Abbot*, 1 Vin. Ab. 185. Decree in *Webb v. Rorke*, 2 Sch. & Lef. 661, 674. *Godfrey v. Watson*, 3 Atk. 517. *Turner v. Crane*, 1 Ver. 184, n. 1. *Walley v. Walley*, Ib. 487.

(b) Tit. 3, c. 1, § 27, 28. Tit. 2, c. 1, § 40. Tit. 12, c. 3, § 12, *et seq.*

of his personal estate, and those entitled thereto; or he might have called for an assignment of it during his life, if he had discovered this limitation in remainder, that it might have been made for the benefit of his executors, not of the remainder. But his not doing any of these clearly proved, that he conceived he had the absolute ownership of the estate; and the Court could not decree to persons claiming this, in contradiction to his apprehension and intent, a conveyance of the inheritance, and likewise of the term, without making a satisfaction to the personal estate of the tenant in tail; as that would be contrary to the maxim, that he who would have equity must do equity. The plaintiffs were decreed to have the estate, subject to the money paid by the tenant in tail, in discharge of the mortgage. (a)

58. In all mortgages, it is expressly stipulated that the mortgagor shall pay *interest* for the money borrowed; but in consequence of the Stat. 12 Ann. st. 2, ch. 16, s. 1, all assurances for the payment of any principal money to be lent, whereupon there shall be *reserved* above 5 *per cent.*, shall be utterly void. And Lord Hardwicke has said, that if a mortgage be drawn only for 5 *per cent.*, and the mortgagee takes six, it would be void upon the word *take* in the statute. (b) <sup>1</sup> †

59. *Interest on mortgages ‡ is due de die in diem*; and, \* 151

(a) *Kirkham v. Smith*, 1 Ves. 258.

(b) Tit. 32, c. 27. 3 Atk. 154.

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<sup>1</sup> This dictum of Lord Hardwicke, in its obvious acceptation, is not law. The security itself is not affected by usury, unless the usury is *thereby* reserved; i. e. unless it is given upon an usurious agreement, made at the same time. If the security is for the actual debt only, with lawful interest, and afterwards, upon a new motive, usury is received; the taker is liable to the penalty of the statute, but the security is good. See *Rex v. Allen*, T. Raym. 197; *Abrahams v. Bunn*, 4 Burr. 2253; *Gray v. Fowler*, 1 H. Bl. 462; *Floyer v. Edwards*, Cowp. 114; *Ferrall v. Shaen*, 1 Saund. 295, n. (1.) by Williams. Mr. Ord has attempted to vindicate Lord Hardwicke's remark, by supposing him to mean that the taking of usury was conclusive evidence of an original corrupt agreement to take it. Ord on Usury, p. 104. See Chitty on Contracts, p. 540—549, with Perkins's notes.

[† By the statute 14 Geo. 3, ch. 79, it is enacted, that all mortgages which shall be made and executed in Great Britain, of or concerning any lands, tenements, hereditaments, &c., being in the kingdom of Ireland, or in any of the British colonies or plantations in the West Indies, to any of his majesty's subjects, and all bonds, covenants, and securities, for payment thereof, and the interest thereof, and all transfers and assignments thereof, shall be as good and effectual as if the same were made and executed in the kingdom, island, plantation, or place where the lands, &c., severally lie, at the rate of interest allowed in those places. Tit. 32, ch. 27.]

[‡ By Statute 3 & 4 Will. 4, ch. 26, s. 42, it is enacted, that after the said 31st day of

therefore, if a person be entitled to the interest of a mortgage for his life, with remainder to another, his executor will be entitled to interest up to the day of his death. (a)

60. It has been usual, where the interest of money lent on mortgage is reserved at the rate of five *per cent.*, to insert a proviso, that if it is punctually paid, the mortgagee will accept of four, or four and a half *per cent.*, which is allowed to be good ; but where the interest reserved was five *per cent.*, with a proviso that if it was not paid within two months after it became due, it should be raised to five and a half *per cent.*, and the interest was not paid within the time, the Court of Chancery would not allow the mortgagee to recover the additional half *per cent.*, because it was in the nature of a penalty, and, therefore, relievable in equity. (b)

61. It is held in an old case, that where money was lent upon mortgage at five *per cent.*, and the mortgagor covenanted to pay six *per cent.*, if he made default for the space of sixty days after the time of payment, the Court decreed that from default made he should pay six *per cent.* The covenant being the agreement of the parties, was not to be relieved against as a penalty. And the same doctrine was held by the House of Peers in 1725, on an appeal from a decree of the Court of Chancery of 152 \* \* Ireland. It does not, however, appear how a distinction can be made between the creation of a penalty by a proviso, or by a covenant. (c)

(a) *Edwards v. Warwick*, 2 P. Wms. 176.

(b) *Jory v. Cox*, Prec. in Cha. 160. *Strode v. Parker*, 2 Vern. 316. *Nichols v. Maynard*, 3 Atk. 519. *Brown v. Barkham*, 1 P. Wms. 652.

(c) *Halifax v. Higgins*, 2 Vern. 134. *Stanhope v. Manners*, 2 Eden, 197. *Burton v. Slatery*, 5 Bro. Parl. Ca. 233.

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December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent ; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.]

62. It is a *general rule* that *interest shall not be allowed upon interest*; and that no agreement, entered into at the time when a mortgage is made, will be sufficient to make future interest principal.<sup>1</sup>

63. A mortgagee compelled the mortgagor to agree that the interest should be turned into principal at the end of every six months. But Lord Hardwicke relieved the mortgagor; and said that interest was seldom allowed to be turned into principal, except upon the advance of fresh money; and even then, it was reckoned a hardship upon the mortgagor, and an act of oppression. (a)

64. There are, however, several *exceptions to this rule*:<sup>2</sup>—

1. *Where the mortgagee assigns over the mortgage to a stranger bonâ fide, and with the consent of the mortgagor*, all the money paid by the assignee that was due to the mortgagee will be considered as principal; and the assignee shall have interest upon the interest then due, and paid by him, as well as upon the principal originally lent. (b)

65.—2. *Where an account has been regularly settled between the parties*, and signed by them, it will carry interest, because in such a case there is an implied contract on the part of the debtor to pay. And all contracts to pay, (says Lord Thurlow,) undoubtedly give a right to interest from the time when the principal ought to have been paid. (c)

66. *Where an account has been settled, between a mortgagor, and a mortgagee, by a Master in Chancery, pursuant to an order, and confirmed by the Court*, interest will be allowed upon what is due, from the time of such settlement, even though part of it be in respect of costs. (d)

[So where a mortgage of land was made, by way of collateral

(a) *Thornhill v. Evans*, 2 Atk. 330. *Sackett v. Bassett*, 5 Mad. 58.

(b) *Ashenhurst v. James*, 3 Atk. 270. *Conway v. Shrimpton*, 5 Bro. Parl. Ca. 187.

(c) *Brown v. Barkham*, 1 P. Wms. 652. *Boddam v. Riley*, 2 Bro. C. C. 2.

(d) *Kelley v. Bellew*, 4 Bro. Parl. Ca. 495. 2 Ves. 471. 1 T. & Rus. 477.

<sup>1</sup> But if a new note is given for the amount of principal and interest then due; or the debt is otherwise liquidated, by adding the interest to the principal, as a new capital carrying interest, by agreement of the parties, it is valid. *Brown v. Barkham*, 1 P. Wms. 652. And see *Brown v. Brent*, 1 H. & Munf. 4; *Hamilton v. Le Grange*, 4 T. R. 613; 2 H. Bl. 144, S. C.; *Pierce v. Rowe*, 1 N. Hamp. R. 179; *Dow v. Drew*, 3 N. Hamp. R. 40.

<sup>2</sup> See, on the subject of annual rests, *ante*, ch. 2, § 30, note.

security, *for such balance as might eventually be due* from the customer to his banker, it was no objection to charging the land with such balance, that it had been partly composed of interest turned into principal by rests, and interest on that interest, according to the course of dealing between a banker and his customers. (a)]

153 \* \* 67.—3. *Where the Court of Chancery enlarges the time for the mortgagor*, that is a favor, as he would otherwise be foreclosed; and it is but just and reasonable that he should pay for it. (b)

68. Thus where on a bill to foreclose, principal, interest, and costs were lumped into one sum by the Master; and it was held, that if the mortgagor, or a puisne mortgagee, prayed longer time to redeem, they must pay interest for the whole sum. (c)

69.—4. In the case of infants, interest is not generally allowed on interest. For one of the grounds upon which interest is turned into principal, is as a punishment on the mortgagor for the non-performance of his contract, which ought not to operate against an infant; but *where a benefit accrues to an infant*, it is otherwise.

70. J. S. mortgaged his estate to the plaintiff, and died, leaving the defendant, his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate. The interest being suffered to run in arrear for three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account; and the defendant herself, who was then near of age, signed it. The account being admitted to be fair, it was held that though regularly interest should not carry interest, yet in some cases, and in some circumstances, it would be injustice if interest should not be made principal. And the rather in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of a subsistence. (d)

71. [*Where a mortgagee in possession receives the rents of the mortgaged estate, after his debt has been satisfied*, and does not

(a) *Rufford v. Bishop*, 5 Russ. 346.

(b) 1 M. & Yo. 567.

(c) *Neale v. Attorney-Gen.*, Moseley, 246. (*Bruere v. Wharton*, 7 Sim. 483.)

(d) *Chesterfield v. Cromwell*, 1 Ab. Eq. 287.



immediately pay them over to the mortgagor, but retains them for his own use, he is chargeable with interest thereon, for he is availing himself of another man's money. (a)

72. So, *when he is in the actual possession* of the mortgaged premises, though not in receipt of rent, he is, in fact, in receipt of profits, and he will be charged with an occupation; and the Court of Chancery will direct *annual rests* to be made with the view to the computation of interest.]

\*73. *All persons seised in fee simple* of lands in mortgage are bound to pay the interest of the mortgage; and *even a tenant for life* may be compelled by the person in remainder or reversion to keep down the interest of a mortgage. But where a person is tenant in tail in possession, and in receipt of the rents and profits of lands which are mortgaged, if he suffers the interest to run in arrear, neither the issue in tail, nor the remainder-man, can compel him to pay the interest incurred during his possession. For the courts of law, as well as those of equity, consider the remainder or reversion to be in the power of the tenant in tail. Nor will his personal estate be liable, after his death, to the payment of the interest, which became due in his lifetime. (b)

74. A person made a mortgage for years; then entailed the estate mortgaged on himself and the heirs male of his body, remainder to his brother, and died leaving issue an infant son, who suffered the interest to accrue on the mortgage for several years; and died just before he came of age, leaving a personal estate. Whereupon it was objected that the executors of the infant son, seeing their testator took the rents and profits of the estate, ought to keep down the interest; the rather for that he never had it in his power to bar the remainder by a recovery.

Lord Talbot said there was no precedent of a tenant in tail being obliged to keep down the interest on a mortgage. A tenant for life was without doubt compellable to do it; but as a tenant in tail had an estate which might last forever, and the remainder over was not assets, nor regarded in law, and as such tenant in tail had a power over the estate, to commit any waste or spoil thereon, a court of equity had never enjoined him to keep down the interest. Wherefore he refused to make any

(a) *Wilson v. Metcalfe*, 1 Russ. 530. See 1 Mad. 269.

(b) Tit. 3, c. 1, § 28.

order upon the executors of the tenant in tail, to pay the arrears of interest; though it appeared there was near twenty years' interest due; and though the tenant in tail died during his infancy, and consequently before it was in his power to have barred the remainder by a recovery. (a)

75. It was, however, determined in a subsequent case, that although a tenant in tail of full age was not obliged to keep down the interest of a mortgage, for the benefit of the remainder-man or reversioner, yet where an infant was tenant in tail of lands in mortgage, and his guardian or trustees were in 155\* the receipt\* of the rents and profits, he should be liable to the payment of the interest as far as the rents and profits would extend.

76. Jane Pitt was tenant for life, with power to charge any sum not exceeding £4000 on the estate, which was limited to her son William Pitt, in tail, remainder to the right heirs of his father. Jane Pitt charged the estate accordingly, and died. William Pitt died without issue, and under age, leaving the interest in arrear. The Court determined that W. Pitt, being an infant, his guardian ought to have applied the rents and profits of the estate to keep down the interest; therefore what ought to be done by the guardian should be considered as done; and consequently the real estate discharged, so far as the rents and profits in the life of the infant would go in discharge; but if that was not sufficient, it was to be an incumbrance on the remainder. (b)

77. If a tenant in tail of land, or the husband of a tenant in tail, pays the interest of a mortgage on the estate tail, neither he, nor any person in his place, will be permitted to set up that as a fact undone; but the remainder-man shall have the benefit of it. (c)

78. In consequence of the principle that all mortgages are deemed part of the personal estate, it is now fully established that *the money due upon mortgage is to be paid to the executor of the mortgagee*, by reason of a rule of equity that the satisfaction should accrue to the fund which sustained the loss. (d)

79. [And where the mortgage money due on a mortgage in

(a) Chaplin v. Chaplin, 3 P. Wms. 235. (b) Sarjeson v. Cruise, cited 1 Ves. 478. 2 Atk. 416.

(c) Amesbury v. Brown, 1 Ves. 477.

(d) Thornborough v. Baker, 1 Cha. Ca. 283. S. C. 3 Swan. Appendix, 628.

fee is paid to the heir of the mortgagee, the executor may recover it from him. (a)]

80. Where a person having a mortgage in fee, devised all his lands and tenements to the plaintiff, and after giving several legacies, gave all the residue of his personal estate to (leaving a blank which he never filled up,) whom he appointed sole executor; the plaintiff, as devisee of all the lands and tenements, claimed the mortgage money. But the administratrix insisted, that by the rule and course of the Court, where lands were mortgaged, the money was accounted part of the personal estate, though the mortgage was in fee; even where the money was payable to the mortgagee and his heirs. That the personal estate being devised to the executor, was a good declaration that it \*should go to the executor, though void as a \*156 devise, for want of naming an executor, and consequently belonging to the administratrix. Decreed accordingly. (b)

81. It has been stated, that in all cases of mortgages, the money borrowed is the principal, and the land the accessory: it follows, that *when the debt is discharged, the interest of the mortgagee in the land ceases in equity*, though the legal estate continues in him. (c)<sup>1</sup>

(a) *Tabor v. Tabor*, 3 Swan. Append. 636.

(b) *Winne v. Littleton*, 2 Cha. Ca. 51. *Canning v. Hicks*, 2 Cha. Ca. 187.

(c) *Ante*, c. 2, § 42, 43.

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<sup>1</sup> The mortgage being made to secure the payment of the money due, it follows that a change of the security, so long as the same debt remains, is no discharge of the mortgage. It has therefore been often held that though the former security be given up and a new one given for the same debt, the mortgage still remains in force; even though the new security be of an higher nature than the old, or other names be added to the original obligation. *Davis v. Maynard*, 9 Mass. 242; *Pond v. Clarke*, 14 Conn. R. 334; *Watkins v. Hill*, 8 Pick. 522; *Dana v. Binney*, 7 Verm. 501; *Pomroy v. Rice*, 16 Pick. 22; *Elliot v. Sleeper*, 2 N. Hamp. R. 525; *Bank v. Willard*, 10 N. Hamp. 210; *Franklin v. Cannon*, 1 Root, 500; *Brinkerhoff v. Lansing*, 4 Johns. Ch. 73, 74; *Dunham v. Dey*, 15 Johns. R. 555; *Bolles v. Chauncey*, 8 Conn. R. 390; [*Hadlock v. Bulfinch*, 31 Maine, (1 Red.) 246; *Cullum v. Branch Bank of Mobile*, 23 Ala. 797; *Union Bank of Louisiana v. Stafford*, 12 How. U. S. 327.] But where the mortgage was given to a surety of the mortgagor in a promissory note, and was conditioned to pay him the contents of the note or indemnify him against his liability on it; and afterwards the note was taken up by the mortgagor, on giving in its stead another note with a different surety; it was held that the mortgage was discharged. *Abbot v. Upton*, 19 Pick. 434. And see *Grugeon v. Gerard*, 4 Young & Coll. 119.

The lien on the land is also discharged by a tender and refusal, though the debt remains due. 1 Pow. on Mortg. 6; 1 Inst. 209 b; *Jackson v. Crafts*, 18 Johns. 110.

But a tender after breach of the condition, does not turn the equity of redemption into an absolute legal estate in the mortgagor. *Merritt v. Lambert*, 7 Paige, 344. See *ante*, ch. 2, § 39, note, and cases there cited.

For the law of tender, see 2 Greenl. on Evid. tit. Tender, § 600—611 *a*.

Where no place of payment is appointed by agreement of the parties, the money is to be paid or tendered to the mortgagee in person, or at his house, as in other cases of personal obligation to pay money. Litt. § 340; 1 Inst. 210 *a*; *Williams v. Hance*, 7 Paige, 581.

[Where a tender of the debt was made to the mortgagee, in pursuance of an agreement that if the mortgage debt was paid at a certain time subsequent to its becoming due, no advantage should be taken of a foreclosure, it was held that interest should not be cast on the debt after the tender. *McNeil v. Call*, 19 N. H. 403. A receipt in full of the mortgage debt by the mortgagee, is an equitable release of the mortgage. *Marrion v. Handy*, 8 Gill. 31. A mortgagee may release his mortgage by a sufficient parol agreement, though the mortgage be under seal, and the debt unpaid. *Wallis v. Long*, 16 Ala. 738. A mortgage of land can be discharged only by payment or release. *Hadlock v. Bulfinch*, 31 Maine, (1 Red.) 246.]

## CHAP. V.

## ORDER IN WHICH MORTGAGES ARE PAID, AND MEANS OF GAINING A PRIORITY.

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| <p>SECT. 1. <i>Mortgages paid according to their Priority.</i></p> <p>5. <i>But not preferred to Statutes, &amp;c.</i></p> <p>7. <i>Legal Incumbrances preferred to equitable ones.</i></p> <p>9. <i>Where Possession of the Deeds gives Priority.</i></p> <p>17. <i>A defective Mortgage not preferred to a second effective one.</i></p> <p>19. <i>But will be preferred to Bond Debts.</i></p> <p>22. <i>Priority may be lost by Fraud.</i></p> | <p>SECT. 28. <i>Of Tacking subsequent to prior Incumbrances.</i></p> <p>29. <i>Effect of obtaining a prior Term for Years.</i></p> <p>33. <i>Where a Declaration of Trust of a Term is sufficient.</i></p> <p>35. <i>How far an Incumbrance will protect.</i></p> <p>40. <i>At what Time a prior Incumbrance may be got in.</i></p> <p>45. <i>Notice.</i></p> <p>46. <i>Direct Notice.</i></p> <p>55. <i>Constructive Notice.</i></p> |
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SECTION 1. *Where there are several mortgages on an estate, they must be paid according to the priority of their respective dates; in pursuance of a rule adopted from the civil law,—Qui prior est in tempore, potior est in jure.*<sup>1</sup>

2. *Where a clause is inserted in a mortgage deed, by which*

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<sup>1</sup> In the United States, where all conveyances of lands are registered, and the registration is notice to all the world, in cases not specially excepted by statute, incumbrances generally have priority, not in the order of their dates, but in the order of their registration. The only exceptions, known to the editor, are the case of the registration of the assignment of a mortgage; which is declared in the statutes of several States not to operate of itself as notice to the mortgagor, so as to invalidate any payment which he may subsequently make to the mortgagee, before he has actual notice of the assignment; see *Indiana Rev. St.* 1843, ch. 29, § 71; *New York Rev. St.* pt. 2, ch. 3, § 48, 3d ed.; and the case of a mortgage given for the purchase-money at the time of the conveyance of the title. This incumbrance, in *New York* and *Indiana*, is preferred over prior judgments against the mortgagor; see *New York Rev. St.* pt. 2, ch. 1, tit. 5, § 5; *Indiana Rev. St.* 1843, ch. 29, § 68; and in *Delaware*, if recorded in sixty days from its date, it is preferred over judgments and every other lien created by the mortgagor.

the lands mortgaged are made a security for any further sums which shall be advanced by the mortgagee, a subsequent loan will be considered as part of the original transaction, and will have a priority over a second mortgage, though subsequent to such second mortgage; and though the first mortgagee had notice of the second mortgage at the time when he made the subsequent loan.<sup>1</sup>

Del. Rev. St. 1829, p. 91. See further, *post*, § 50, note. Also, Vol. IV. tit. 32, ch. 29; 4 Kent, Comm. 174—180; Grant v. Bissett, 1 Caines, Cas. 112. [Boyce v. Boyce, 6 Rich. Eq. (S. C.) 302.]

If a mortgage is made by a tenant in common, of his share of the land held in common, the lien thus created will attach to the portion of the land afterwards set off to the mortgagor, in a regular process of partition. Crosby v. Allyn, 5 Greenl. 453; Williams College v. Mallett, 3 Fairf. 398; Randell v. Mallett, 2 Shepl. 51.

<sup>1</sup> Where a mortgage to secure future advances or liabilities, is set up against another and subsequent incumbrance, it is requisite that the mortgage deed should disclose the fact that it was intended to cover such advances, giving such information as to the extent and certainty of the contract, that a junior creditor may, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. This is requisite to secure good faith, and prevent error and imposition in dealing. The prior mortgagee cannot enlarge his demand beyond what appears upon record, or is there indicated with sufficient certainty to put subsequent creditors or purchasers upon inquiry, and enable them to ascertain, by inquiry *aliunde*, the extent of the incumbrance; or, from its nature, as in case of a mortgage for indemnity, that there is a prior lien which is incapable of present definite ascertainment. See 4 Kent, Comm. 175, 176; Hubbard v. Savage, 8 Conn. 215, 219; Crane v. Deming, 7 Conn. 387, 396; St. Andrew's Ch. v. Tompkins, 7 Johns. Ch. R. 14; Garber v. Henry, 6 Watts. 57; United States v. Hooe, 3 Cranch, 73, 89; Conard v. Atlantic Ins. Co. 1 Pet. 448; Badlam v. Tucker, 1 Pick. 389, 398; Shirras v. Caig, 7 Cranch, 34, 50, 51. [A mortgage made to secure future advances is valid against the creditors of the mortgagor, if it is free from fraud. Seaman v. Fleming, 7 Rich. Eq. (S. C.) 283; Collins v. Carlisle, 13 Ill. 254. But see *In re Young's Estate*, 3 Md. Ch. Decis. 461. A mortgage to secure advances and credits to be made within a time limited therein, secures none made afterwards. Miller v. Whittier, 36 Maine, (1 Heath,) 577; Trescott v. King, 2 Selden, N. Y. 147. Where a mortgage is given to secure a party, who is bound to accept drafts, the lien of the mortgage attaches from the date of the negotiation or acceptance of the draft. Choteau v. Thompson, 2 Ohio, (N. S.) 114.]

By the law of *New Hampshire*, Rev. Stat. 1842, ch. 131, § 2, no estate can be incumbered, by any agreement, "unless it is inserted in the condition and made part thereof, stating the sum of money to be secured, or other thing to be performed." But this has been expounded by considering it only to require that the nature and extent of the claim be so far set forth as to leave no doubt as to its identity. The same statute, § 3, provides that no mortgage shall be valid "for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment of which arises, is made or contracted after the execution and delivery of such mortgage." But it is held, that a mortgage, intended to secure a present debt, and also future advances, not then contracted for, is valid as to the present debt, and void only as to the residue. Leeds v. Cameron, 3 Sumn. R. 488; New Hamp. Bank v. Willard, 10 N. Hamp. R. 210.

3. A mortgaged to B for a term of years, to secure a sum of money already lent, and also such other sums as B should afterwards \*lend or advance to him. A made a subse- \*158  
quent mortgage to C for a certain sum, with notice of the first mortgage; and then the first mortgagee, having notice of the second mortgage, advanced a further sum. The question was, upon what terms the second mortgagee should redeem the first mortgage. Lord Cowper declared the second mortgagee should not redeem the first mortgage without paying all that was due, as well the money lent after, as that before, the second mortgage was made; for it was the folly of the second mortgagee, with notice, to take such a security. (a) <sup>1</sup>

4. *Where there are several equitable interests* affecting the same estate, they will also attach upon it, according to the respective times at which they commenced; it being a rule of the Court of Chancery, that equity follows the law. (b) <sup>2</sup>

5. Mortgages are, however, *not preferred* in a court of equity to statutes, judgments, or recognizances; but each of these securities takes place according to the priority of its date, in the same manner as in a court of law.

6. Sir W. Bassett being seised in fee of several real estates, and indebted to several persons, by mortgages, judgments, and otherwise, devised all his estates to trustees, to be sold for the payment of his debts and legacies.

Controversies having arisen among the creditors concerning the priority of their respective securities, two suits were instituted in the Court of Chancery, where it was decreed that the

(a) *Gordon v. Graham*, 7 Vin. Ab. 52. *Vernon v. Bethell*, 2 Eden, 110.

(b) 2 P. Wms. 495. *Frere v. Moore*, 8 Price, 475.

<sup>1</sup> See *Brinckerhoff v. Marvin*, 5 Johns. Ch. 320, 326; 2 Pow. on Mortg. 534, a, note (E) by Coventry; *Demainbray v. Metcalfe*, 2 Vern. 698, note (3) by Raithby.

<sup>2</sup> The general doctrine may here be noted, that where one creditor has a lien on two estates, and another creditor has a lien on one of them only, the latter may compel the former to resort first to the fund that is not common to them both. *Lanoy v. D. of Athol*, 2 Atk. 446; *Aldrich v. Cooper*, 8 Ves. 388; *Greenwood v. Taylor*, 1 Russ. & Mylne, 185, 187; *Evertson v. Booth*, 19 Johns. 486; *Dorr v. Shaw*, 4 Johns. Ch. R. 17; *Hawley v. Mancius*, 7 Johns. Ch. R. 174, 184; *Conrad v. Harrison*, 3 Leigh, 532; *Wiggin v. Dorr*, 3 Sumn. 410, 414. And see 1 Story, Eq. Jur. § 559, 633—635, 642.

<sup>3</sup> If the mortgagee, upon the insolvency or bankruptcy of the mortgagor, proves his entire debt under the proceedings for settlement of the estate, receiving his dividend upon the whole amount, it is a waiver of the mortgage. *Hooker v. Olmstead*, 6 Pick. 481; *Amory v. Francis*, 16 Mass. 308; 2 Madd. Chan. 655.

money arising from the sale, should be applied, in the first place, to pay the mortgages, and in the next place the judgment and statute creditors.

The persons whose judgments were prior to the mortgages, appealed to the House of Peers, insisting that they ought to be paid their several debts according to the due course of law and equity; that their securities by judgment did in law affect the real estate, and the trust thereof, from the several days on which such judgments were signed, without the aid of the will, therefore ought to take place according to their respective priorities, as well on equities of redemption, as on legal estates; more especially in preference to mortgages which were not in being when those judgments were signed, which could not, therefore, take from the appellants any security that was before  
159\* legally or equitably vested in them; or render their judgments\* in any degree less effectual than they were at the respective times of signing the same.

On the other side it was said that the equity of redemption of the testator's estate was actually mortgaged without notice of the judgments, and before the same were extended; that, therefore, those mortgages ought to be satisfied before them; and that in a court of equity, judgment creditors could only compel the sale of an estate of inheritance for their satisfaction. If that estate happened to be in mortgage, it was not reasonable that the mortgagees should be decreed to convey to a purchaser, without first receiving their money.

It was ordered that the appellants should be let into a satisfaction of their debts, according to the priority of their several securities. (a)

7. *Where incumbrances are all merely equitable*, a mortgage of the *legal estate* to a person who has no notice of such incumbrances, *will give such mortgagee a priority* over them. But if any of the equitable incumbrances are excepted, that circumstance will give them a priority over those that are not excepted.

8. T. Gibson & Co. being scriveners, and having large sums of money of other people in their hands, had lent Mr. Stiles, upon a mortgage of the manors of Bremhill and Cadenham, and

(a) *Symmes v. Symonds*, 4 Bro. Parl. Ca. 328.



other lands in Wiltshire, several sums, which in 1743, were reported to amount to above £50,000: and those estates were then decreed to be sold for payment thereof. Before this, Gibson and his partners had given declarations of trust to several of their creditors, who had money in their hands, assigning them several parts of the mortgage money due by Mr. Stiles, and declaring themselves trustees for them according to their respective demands. These declarations of trust amounted originally to £27,900, of which £2000 was to be paid out of £8500 due to Gibson & Co. by Sir John Eyles upon the manor of Gidea Hall; and the remaining £25,900 out of the money due upon Bremhill. Gibson & Co. were reported the best purchasers of Bremhill and Cadenham; the first at £50,000, and the last at £10,000. This report being confirmed, by lease and release in 1744, Bremhill was conveyed to Gibson and Sutton who were the surviving partners; Cadenham was conveyed to a trustee for them.

\* Gibson & Co. being indebted by two several bonds to \*160 Mr. Pelham in £23,500 and interest, and to Mr. Winnington in £15,000 and interest, by lease and release, in 1744, conveyed to Mr. Pelham and Mr. Winnington all their interest in Gidea Hall, which had been then lately conveyed to the trustees to sell, for payment of the debt due to Gibson; and also conveyed to them the manor of Bremhill, and other lands which had belonged to the late Mr. Stiles, with a proviso for redemption upon payment of £23,500 and interest to Mr. Pelham, and £15,000 and interest to Mr. Winnington; but in the deed was contained an exception of an assignment and declaration of trust made by Gibson & Co. in October, 1735, to John Witham for £7000 and interest, part of the money due to them from Stiles on the security of Bremhill; another to Sarah and Benjamin Lethuillier, of 18th February, 1741, for £5500, part also of that security; another to Hinde and Pickard, of 20th February, 1741, for £2000, as part also thereof; another to Ashby, of 8th April, 1742, for £2500 on the same account; another to Sarah Lethuillier, of 2d September, 1742, for £2000, part of the money secured upon Gidea Hall.

The manor of Gidea Hall was afterwards sold; and Mr. Pelham in a great measure, paid off out of the purchase-money, as was also Sarah Lethuillier her £2000.

T. Gibson died in 1744. Sutton, the surviving partner, being a bankrupt, and there being a considerable deficiency for payment of the creditors, the plaintiff, as executor to Mr. Winnington, brought his bill for a sale of Bremhill, and the other premises comprised in the mortgage of 1744, and to have the priority of such creditors as had any demands on the mortgaged premises settled.

It came out upon the answers of the defendants, that there were several other creditors who, previous to Mr. Pelham and Mr. Winnington's mortgage, had assignments and declarations of trust of and upon the mortgage money secured by Bremhill, most of which were prior in time to those excepted in Mr. Pelham and Mr. Winnington's mortgage.

The question made between the defendants was, whether the excepted and unexcepted creditors, being all but equitable incumbrancers, under their several declarations of trust from Gibson & Co., were not to be satisfied according to their  
161 \* several \* priorities: or whether those excepted had not gained a preference, by the notice which Mr. Pelham and Mr. Winnington had of their demands; for Mr. P. and Mr. W. having the legal as well as an equitable estate in them, it was allowed that, till after they were satisfied, nothing more could be drawn from them than the sums excepted in their mortgage.

Lord Hardwicke. The bill is brought by the plaintiff, as representative of Mr. Winnington, for a satisfaction of his demand out of the mortgaged premises, and if those not sufficient, out of Gibson's general estate; next, to have the priority of the several creditors settled. In this arises a question between the unexcepted and excepted creditors, in the conveyance made to Mr. Pelham and Mr. Winnington; whether the exception of some of the creditors taken *sparsim*, and not as they stood in point of time, will give them any preference to those who were not excepted.

Mr. Stiles was seised of these two manors of Bremhill and Cadenham; and having borrowed upon a mortgage £50,000 of Gibson and Sutton, scriveners, they who lent their clients' money, gave them security by declarations of trust, upon the security which they had themselves from Mr. Stiles. The declarations of trust thus given by them, amounted, originally, to

£27,900, of which £2,000 was part of a debt from Sir John Eyles, secured on Gidea Hall. Mr. Stiles being dead, Gibson and Sutton being reported the best purchaser of Bremhill and Cadenham, and having got in the legal estate in May, 1744, they in June following, convey these premises by way of security to Mr. Pelham for £23,500, and to Mr. Winnington for £15,000, payable on the 15th of December then next, in which security they except several declarations of trust upon, and assignments of, part of the mortgage money secured on Bremhill, amounting to £20,000, and one of £2000, secured upon the money due from Gidea Hall. Hence it is clear that Mr. Pelham and Mr. Winnington had notice of these incumbrances; but as clear that they had no notice of any other. After this, Gibson dies, and Sutton becomes a bankrupt. Now it is come to be a question between their creditors, excepted in Mr. Pelham and Mr. Winnington's securities, and those not excepted, whether they all shall stand in their priority in order of time; or whether those excepted have thereby gained any preference to the others. No

\* case exactly similar to the present has been cited; and I \* 162 wish that, all being equally fair and honest creditors, I could in this general shipwreck, let them all in equally: but as the rules of the Court will not warrant me in so doing, one or the other set of creditors must lose.

The questions, therefore, are,—1st. How the right stood as between themselves before the conveyance to Mr. Pelham and Mr. Winnington? 2dly. What alteration was made by that conveyance?

As to the first, all the creditors being but equitable incumbrancers, and none of them having a better right to call for the legal estate than the other, the rule *Qui prior est tempore, potior est in jure*, must have place between them; and yet they had left in the power of Gibson and Sutton to give a preference to any one of them they pleased, even to the very last of them, by granting him the legal estate, who must then have been preferred to all the rest; for having got the law on his side, and equal equity with the others, this Court could not take the benefit of the law from him. (a)

The next question is, whether the excepted creditors have gained any preference by that exception, which on the one hand

is contended to be notice sufficient to Mr. Pelham and Mr. Winnington to make them trustees for such excepted creditors; and on the other is said to be only a notice to them, that so much and no more was to be drawn out of their estate; but that they were no way concerned to whom the money drawn from them should be paid. I am sorry to say that the exception has the effect of making Mr. Pelham and Mr. Winnington trustees for the excepted creditors; because I heartily wish all the creditors could come in equally; but not having the power of making it so, the rule of the Court must take place.

The argument used for the excepted put the unexcepted creditors to a dilemma. We are, say they, prior to Mr. Pelham and Mr. Winnington, who are prior to you; consequently, we must be prior to you too. Had this been a conveyance with a covenant from Mr. Pelham and Mr. Winnington to pay those creditors, it had been impossible to say that the other creditors should have any benefit of that covenant: but Mr. Pelham and Mr. Winnington would have been not only trustees for, but debtors to,

those whom they had so covenanted to pay; or had  
163\* \*the conveyance been to trustees, to raise money by sale

or mortgage to pay these creditors, and then to pay Mr. Pelham and Mr. Winnington, the legal estate being conveyed for their benefit, would have given them a preference. Now this conveyance, though by way of mortgage, to Mr. Pelham and Mr. Winnington, comes very near a conveyance to trustees to sell, as those creditors could only have remedy by a sale; for having no legal estate in them, a decree of foreclosure would have signified nothing to them, as foreclosure is of no effect but where the party foreclosing has the legal estate. The question, therefore, turns upon the rules of the Court as to notice, which binds the conscience of the party, as to the right of another party, whereof he has notice; and this Court always raises an implied trust from that notice. So Mr. Pelham and Mr. Winnington, having notice of these excepted creditors, became trustees for them, and their conscience was bound as to those creditor's demands; but could not be so as to other creditors, of whom they had no notice.— Upon the rules of the Court, therefore, I am of opinion that I cannot divest the excepted creditors of the right they have acquired by Mr. Pelham and Mr. Winnington's having notice of their demands. (a)

(a) *Ingram v. Gibson*, MSS. Rep. 1752. Amb. 153.

9. It was laid down by the late Mr. J. Buller, that *where a second mortgagee is in possession of the title deeds* of the estate mortgaged, that circumstance will *entitle him to a priority* over the first mortgagee; because where a person lends money upon mortgage, without requiring the title deeds to be delivered to him, he thereby enables the mortgagor to practice a fraud upon a third person. *This rule is, however, much too general*, as there are many cases in which the title deeds cannot be delivered up. And the doctrine always was, that *nothing but a voluntary, distinct, and unjustifiable concurrence* on the part of the first mortgagee, to the mortgagor's retaining the title deeds, should be a reason for postponing his priority. (a) <sup>1</sup>

(a) Goodtitle v. Morgan, *infra*. Treat. of Eq. B. 1, c. 3, § 4.

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<sup>1</sup> It has already been seen, *ante*, ch. 1, § 20, note, that whether an equitable mortgage can be created in the United States, by the mere deposit of title deeds, is at least extremely doubtful. It would seem equally questionable whether a priority can be gained by the possession of the title deeds alone without any other element of superior equity in the case.

The principle of the doctrine in the text has been stated by Chancellor Kent in the following terms:—"It is understood to have been the old rule in the English Chancery, that if a person took a mortgage, and voluntarily left the title deeds with the mortgagor, he was to be postponed to a subsequent mortgagee, without notice, and who was in possession of the title deeds. The reason of the rule was, that, by leaving the title deeds, he enabled the mortgagor to impose upon others who have no registry to resort to, except in the counties of Yorkshire and Middlesex, and who, therefore, can only look for their security to the title deeds, and the possession of the mortgagor. The rule was so understood and declared, by Mr. Justice Burnet, in *Ryall v. Rolle*, (1 Atk. 168, 172; 1 Vesey, 360,) and by Mr. Justice Buller, in *Goodtitle v. Morgan*, (1 Term Rep. 762,) and there are decisions which have given great weight to the circumstance of the title deeds being in possession of the junior mortgagee. Thus in *Head v. Eger-ton*, (3 P. Wms. 280,) the Lord Chancellor said, it was hard enough upon a subsequent mortgagee, that he had lent his money upon lands subject to a prior mortgage, without notice of it, and, therefore, he could not add to his hardship, by taking away from him the title deeds, and giving them to the elder mortgagee, unless the first mortgagee paid him his money; especially as the first mortgagee, by leaving the title deeds with the mortgagor, had been, in some measure, accessory in drawing in the defendant to lend him money. This case, however, so far from establishing what was supposed to be the old rule of equity, evidently contradicts it, and admits the better title in the first mortgagee. So, in the case of *Stanhope v. Verney*, before Lord Northington, (Butler's note to Co. Litt. 290, 296, § 13,) the second mortgagee, without notice, had possession of the title deeds, but the Chancellor did not give him the preference on that single circumstance, but because he also had got possession of an outstanding term. There does not seem, therefore, to be the requisite evidence of the existence of any such rule in equity, as has been stated by some of the judges; and if there was, a different rule has been since established. It is now the settled English doctrine, that the mere cir-

10. Thus, where it appeared that, the mortgagor got back the title deeds from the first mortgagee, upon a reasonable pretence, Lord Cowper dismissed the bill brought by the second mortgagee to postpone the first. (a)

11. Mr. Fonblanque mentions a case, where it appearing that the first mortgagee had required, and was assured by the mortgagor, that he had delivered to him all the title deeds; 164\* Lord \*Thurlow held, there must be a voluntary leaving of the deeds to entitle the second mortgagee to a priority. (b)

12. In another case Lord Thurlow held that a mortgagee of a reversion, who had not the title deeds, should not be postponed to a second mortgagee, whose mortgage was made after the mortgagor had come into possession, and who had got the title deeds; there being neither fraud nor gross negligence. (c)

13. One Basnett having deposited the title deeds of an estate in the hands of Plumb, to whom he was indebted, afterwards mortgaged the estate to Fluitt, to whom he was also indebted. Basnett having become a bankrupt, Plumb filed his bill against Fluitt for a sale of the estate, and to restrain the defendant from proceeding at law to recover possession of the premises. The circumstances of the transaction were disputed. The plaintiff

(a) *Peter v. Russell*, 1 Ab. Eq. 321.

(b) *Pinner v. Jemmett*, Treat. of Eq. B. 1, c. 3, § 4.

(c) *Tourle v. Rand*, 2 Bro. C. C. 650.

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cumstance of leaving the title deeds with the mortgagor, is not, *of itself*, sufficient to postpone the first mortgagee, and to give the preference to a second mortgagee, who takes the title deeds with his mortgage, and without notice of the prior incumbrance. There must be fraud, or gross negligence, which amounts to it, to defeat the prior mortgage. There must be something like a voluntary, distinct, and unjustifiable *concurrency*, on the part of the first mortgagee, to the mortgagor's retaining the title deeds, before he shall be postponed. Lord Thurlow, in *Tourle v. Rand*, (2 Bro. 650,) said he did not conceive of any other rule by which the first mortgagee was to be postponed, but fraud or gross negligence, and that the mere fact of not taking the title deeds was not sufficient; and that if there were any cases to the contrary, he wished they had been named. So the rule was also understood by Chief Baron Eyre, in *Plumb v. Fluitt*, (2 Anst. 432,) and has since been repeatedly recognized. (Lord Eldon, in 6 Vesey, 183, 190; Sir William Grant, in 12 Vesey, 130; 1 Fonb. 153, 155, note.) It is admitted, by these same high authorities, to be just, that the mortgagee, who leaves the title deeds with the mortgagor, so as to enable him to commit a fraud, by holding himself out as absolute owner, should be postponed; but the established doctrine is, that nothing but fraud, express or implied, will postpone him." *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. R. 608—610.

endeavored to fix the defendant with actual notice of the deposits; and for that purpose read the testimony of Basnett, who swore that he had informed the defendant of the deposit of the title deeds, before the execution of the mortgage; and this evidence was admitted by the Court.

Lord Chief Baron Eyre said—The legal estate being in the defendant, the question was, whether the plaintiff could raise a trust upon his estate, so as to gain a priority for his own demand. It was fully settled that a deposit of title deeds, as a security for a debt, amounted to an equitable mortgage. If the plaintiff could prove actual or constructive notice of the deposit in the defendant, it raised a trust in him to the amount of that equitable mortgage. As to the evidence of actual notice, the testimony of Basnett alone, unsupported and opposed, was too weak to found a decree, or even to direct an issue upon it. Swearing to the fraudulent intention of his own deed, he could expect little credit in a court of equity. A great deal had also been said about constructive notice, which he took to be in its nature no more than evidence of notice, the presumptions of which were so violent, that the Court would not allow even of its being controverted. Thus, if a mortgagee had a deed put into his hands, which recited another deed, that showed a title in some other person, the Court would presume him to have notice, and would not permit any evidence to disprove it. The only reason that could raise in this case a notion of constructive notice was, that the deeds were not forthcoming. But was it possible that \*this circumstance could of itself be notice of the hands \*165 into which they were fallen, or the purpose to which they had been applied? At the utmost, it could only be a circumstance of evidence, to show that there was reason for further inquiry; but, being unsupported by any other circumstances, it proved nothing.

It was said, no man would advance money upon an estate without seeing the title deeds, unless with a fraudulent intention. He wished he saw, in a court of equity, some solid distinction established between a consideration which was an old debt, and a sum advanced *de novo*. There certainly was a great difference. In the one case the creditor jumped at any security he could get; he took the deed of conveyance, and trusted to get the title deeds

afterwards. But till such a distinction was established, it was difficult to apply the reasoning which would belong to it.

The person who took the legal estate without the deeds, in a case like this, appeared to him, unless there was fraud, to be less blamable than he who took the deeds without the estate.

Upon all the circumstances, he could see nothing in the case that amounted to constructive notice.

With respect to the general question, the effect of leaving the title deeds in the hands of the mortgagor, the most intelligible rule, and, in his opinion, the most agreeable to justice, would have been to say, that if a man took, as his security for his mortgage, a single deed, and left the other deeds in the hands of the mortgagor, so as to enable him to commit a fraud, that he should in all such cases be postponed, without reference to the quantity of pains or diligence which he exercised to obtain the deeds; for whether the pains were more or less, the mischief was the same. And if he had found the rule so laid down, he should have been perfectly satisfied. But it had been decided otherwise in the late cases; which established the rule, that nothing but fraud, or gross and voluntary negligence in leaving the title deeds, would oust the priority of the legal claimant.

In the present case, all the negligence, or all the activity in the world, would have left the defendant in exactly the same situation in which he then was. He took his mortgage as the only security he could get; if it was already mortgaged, he was only where he was before. He seized it as a plank, to save something; for as a second mortgage it was worth nothing.

166\* \*The plaintiff having therefore failed in making out his case, either by actual or constructive notice, and the general proposition not being supported, which, if established, must apply to purchases as well as to mortgages, the bill must be dismissed with costs. (a)

14. In a subsequent case, Lord Eldon said, "The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgage. I agree with

(a) *Plumb v. Fluijt*, 2 Anstr. R. 432.



Chief Justice Eyre, I should have been glad to have found the rule established in the Court the other way; at the same time, allowance must be made for the cases put by Mr. Fonblanque, of joint tenants and tenants in common, cases of necessary exception. All cannot have the deeds; therefore, if the rule could be pressed to the extent to which Mr. Justice Buller carried it, those cases must be excepted, in which, from the nature of the title, the deeds may be honestly out of the possession. With that exception, such a rule would avoid a great deal of fraud in mortgage titles; upon which this observation arises, that no man can tell when he is perfectly secure. But there is not such a rule." (a)

15. [In *Harper v. Faulder*, (b) it was decided that the first incumbrancer, leaving the deeds with the mortgagor, should not be postponed, unless the possession of the title deeds were legally incident to his security.

In that case, estates were vested in trustees in trust to raise £35,000 next to indemnify the lenders of that sum from a rent-charge of £400 per annum, and against a portion of £5000 for younger children. In order to raise part of the £35,000, the trustees, in consideration of £5000, granted an annuity to F., which was secured by a term and a judgment not docketed. The annuitant permitted the deeds to remain in the custody of the trustees, who afterwards made a mortgage for raising the other part of the £35,000, without informing the mortgagee of F.'s incumbrance. The question was, whether the annuitant should be postponed to the mortgagee. Sir John Leach, V. C., decided in the negative, observing, that not only was the possession of the \*title deeds not legally incident to F.'s \* 167 estate, and that he was not required, upon the principle of reasonable diligence, to have stipulated for them; but that it would have been a breach of trust in the trustees to have given one incumbrancer those deeds which they were bound to keep for the security of all persons advancing money upon the credit of their trust.]

16. It should, however, be observed, that where a second mortgagee has got possession of the title deeds, a court of equity will not take them from him, unless the first mortgagee pays him his money. (c)

(a) *Evans v. Bicknell*, 6 Ves. 190. *Barnett v. Weston*, 12 Ves. 130.

(b) 4 Mad. 129.

(c) *Head v. Egerton*, 3 P. Wms. 280.

17. If a person mortgages his lands by a defective conveyance, and afterwards mortgages them by an assurance that is good and effectual, to a person who has no notice of the defective conveyance, the second mortgage will prevail; because that carries the legal estate; and equity will not interfere, where both parties are equally innocent.

18. Copyhold lands were mortgaged, but without a surrender; they were afterwards mortgaged to another person, and surrendered to him. The Master of the Rolls, on solemn argument, dismissed the bill of the first mortgagee with costs, and held that equity would not supply the defect of a surrender against a person who came in by title, upon surrender of the same premises.

The case was reheard before Lord Cowper, who was of the same opinion; and took this difference, that when there are two persons that have equal equity, then those that have the legal estate shall prevail, because there is no equity to take from such persons the title that they have gained at law. (But if the contending parties in equity have not equal equity, then those that have the greatest equity shall prevail against the legal title; as, if a creditor takes hold of the land by a feoffment in mortgage, with livery, equity will supply the defective conveyance against a subsequent judgment creditor; because the judgment creditor, not relying on the land for his security, he hath not an equal equity to have it applied for the payment of his debt, as he that took it in mortgage.) (a)<sup>1</sup>

19. But if a person mortgages his land by a defective conveyance, and there be subsequent debts, which did not originally affect the land, such as debts by bond, there the defect of such conveyance will be supplied, in equity, against such incumbrancers, though they afterwards acquire a legal title to the land. For since the subsequent incumbrancers did not originally take the lands for their security, nor had an intention to affect them, when afterwards the lands are affected, and they come in under the person who was obliged in conscience to make the security good, they will not be allowed to stand in his place; but will be postponed to such defective conveyance.<sup>2</sup>

(a) *Oxwick v. Plumer*, 5 Bac. Ab. 43.

<sup>1</sup> See Coote on Mort. 223—230.

<sup>2</sup> If a prior mortgagee has a mortgage of two funds, and a second mortgagee has a

\*20. Henry Francis, father of the defendant Henry, in \*168 consideration of £400, mortgaged the premises by feoffment in fee to the plaintiff's testator, but made no livery thereon, and covenanted for further assurance. Henry Francis, the father, borrowed of Burgh, the testator, £77 on bond; and promised that the mortgaged premises should be security for it. He afterwards made his will; and thereof appointed his son, Henry Francis, executor. Burgh died, and the plaintiff proved his will. The defendant, Henry Francis, confessed several judgments on bonds entered into by his father, namely, seven judgments as heir, and one as executor to his father. One of these seven judgments was obtained by Hayman, a defendant, in Hilary Term, 1670, for £400; all the other judgments were entered about the same time.

The cause was heard by Lord Keeper Finch, assisted by Judge Wild, who declared, the Court was fully satisfied that the plaintiff ought to be relieved, and the said judgments ought not to incumber the premises, till the mortgage money was fully paid; wherein the Court did not ground its judgment upon the manner of obtaining the judgments, all in a term, and most of them together; nor on the special way whereby the heir charged the lands, by pleading *riens per descents*; but upon the true nature of the case. The Court declared, that the debt due upon mortgage did originally charge the lands, which the bonds did not, till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments, to charge the lands in the prejudice of that equity, the rather because of the covenant for further assurance. And though the mortgage was defective in law, for want of livery, yet equity, which supplied that defect, charged the lands; and though the creditors had no notice, yet they should be bound, because they were put in no worse condition than they ought to be, viz. to be postponed to the mortgage. Therefore, it was decreed, that the defendant Henry, the heir, should convey to the plaintiff or her assigns in

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mortgage of only one of the same funds, the former must first exhaust the fund mortgaged to himself alone, before he can resort to that which is mortgaged to both creditors; and this, though there may be a question as to the validity of the first mortgage. *York & Jersey Steamboat Co. v. Jersey Co.* 1 Hopk. 460.

fee, redeemable on payment of £400, and the premises to be held quietly against the plaintiffs. (a)<sup>1</sup>

21. A surrendered a copyhold estate, by way of mortgage, for money lent; but the surrender was not presented. A became a bankrupt; his assignees were admitted to the copyhold, and brought their ejectment to obtain possession of it. The 169\* \* mortgagee brought his bill in Chancery to be relieved.

The Court decreed a perpetual injunction in behalf of the mortgagee; for though it was said that the creditors of the bankrupt were equally valuable as the mortgagee, and having the title at law, they ought to be preferred; yet it was overruled, because the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did; therefore, when such creditors came under the bankrupt to charge the land, they ought to stand in his place, and come under the same obligation of conscience, to make good the defective security. (b)

22. The *priority of payment*, according to the date of each mortgage, or other incumbrance, *may be lost by any fraud* or artifice of the first mortgagee, in concealing his own mortgage, for the purpose of inducing another person to lend money on the same lands. For in such a case the Court of Chancery will give a priority to the subsequent incumbrance. (c)

23. A person who was a counsellor, having lent £8000 to A, upon a mortgage in fee of a manor, and on a statute, in the penalty of £16,000, was afterwards consulted by B as to a loan of £2000 to A; encouraged him to lend the money, and drew the mortgage deed, in which he inserted a covenant, that the estate was free from incumbrances. It was decreed that B, the second mortgagee, should have a priority. (d)

(a) *Burgh v. Francis*, 1 Ab. Eq. 320. Finch. 28. 5 Bac. Ab. 41. S. C. 3 Swan. App. 586. Lord Nottingham's MSS.

(b) *Taylor v. Wheeler*, 2 Vern. 564. 1 P. Wms. 279.

(c) *Treat. of Eq. B. 1, c. 3, § 4.* (1 Story, Eq. Jur. § 390. *Lee v. Munroe*, 7 Cranch, 366, 368. *Lasalle v. Barnett*, 1 Blackf. 150.)

(d) *Draper v. Borlace*, 2 Vern. 230.

<sup>1</sup> It has been doubted whether this case authorizes the general position, that equity will in every case, postpone a subsequent judgment creditor to a prior defective mortgage. For, in the first place, it is a general rule of equity, that the Court will not interpose in prejudice of a defendant having a legal interest, for a valuable consideration, and without notice of the plaintiff's equity; and secondly, as the defect arises from the neglect of the mortgagee himself, he does not appear entitled to much favor to the prejudice of a more prudent creditor. See 1 Fonbl. on Eq. 38; Coote on Mortg. 227, n.

24. A mortgagee was present when the mortgagor was in treaty with the father of the lady for the marriage of his son; and the lands which were in mortgage, being agreed to be settled upon his marriage, to the intended husband for life, remainder to the wife for life, remainder to the issue of the marriage; it was not opposed by the mortgagee, who fraudulently concealed his mortgage, and at the same time privately assured the father of the young man that he would trust to his personal security. It was decreed that the son, and the issue of the marriage, should hold the lands quietly against the mortgagee and his heirs. (a)

25. But where the party to whom the fraud is imputed was *not comasant of the treaty*, nor in any manner, nor for any fraudulent purpose, confederating with the party practising the fraud, this principle does not apply.

26. Thus, if a person, intending to advance money on a mortgage, applies to a prior incumbrancer to know whether he has any charge on the estate on which he intends to lend his money, and he denies that he has any charge, he will thereby lose his priority. But the person intending to advance the money, or his agent, must inform the prior incumbrancer that he intends to lend money on the lands; for the prior incumbrancer is not bound to answer, unless he knows of such intention; as the question may be asked merely to satisfy an impertinent curiosity. (b)

27. It was *formerly* held, that if a mortgagee was witness to a second mortgage deed, it would give a priority to the second mortgagee. In a subsequent case, Lord Hardwicke is reported to have said, he did not think the bare attesting a deed by a person as a witness would create such a presumption of his knowledge of the contents, as to affect him with any fraud; for a witness is only to authenticate it, and not to be privy to the contents. And in a modern case, Lord Thurlow said:—"I do not leave this as a case which I should determine in the same manner; for a witness, in practice, is not privy to the contents of the deed." (c) <sup>1</sup>

(a) Berisford v. Milward, 3 Atk. 49.

(b) Ibbotson v. Rhodes, 2 Vern. 554. Pasley v. Freeman, 3 Term. R. 51. 6 Ves. 186. Pearson v. Morgan, 1 Bro. C. C. 63. 2 Bro. C. C. 388.

(c) Mocatta v. Murgatroyd, 1 P. Wms. 393. Welford v. Beazeley, 1 Ves. 6. Digby v. Craggs, 2 Eden, 200. Becket v. Cordley, 1 Bro. C. C. 353.

<sup>1</sup> The ground of postponing the prior title in such cases is, that the party, by his

28. It has been already stated, that if a purchaser, without notice of any incumbrance, obtains an assignment of a prior statute, judgment, or recognizance, to a trustee for himself, he may by that means protect the lands purchased from any mesne incumbrances. Now, as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has been extended to them; and it has been long settled, that a mortgagee who has advanced his money, without notice of any prior incumbrance, may, by getting an assignment of a statute, judgment, or recognizance, protect himself from any incumbrance subsequent to such statute, judgment, or recognizance, though prior to his mortgage; that is, he will be *allowed to tack*<sup>1</sup> or unite his mortgage to such old security, and will by that means be entitled to recover all the moneys for which such security was given, together with the money due on his mortgage, before the prior mortgagees are entitled to recover any thing. (a) †

174 \* \* 29. The nature of outstanding terms for years, and the distinction between terms in gross and terms attendant on the inheritance, having been already explained, it will be  
175 \* sufficient \* here to state, that where a second or third mortgagee, who advanced his money without notice of any prior incumbrance, can obtain *an assignment of an old term in gross to a trustee for himself*, he will be thereby enabled to retain possession of the legal estate, till he is repaid all the money due on his mortgage. (b)

30. Although a term has been *assigned upon an express trust to attend the inheritance*; yet if a subsequent incumbrancer gets an assignment of it to a trustee for himself, it will protect him

(a) Tit. 12, c. 3, § 34. Tit. 14, § 108.

(b) Tit. 12, c. 3.

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silence, has knowingly participated in what would otherwise be a fraud on the second incumbrancer. Thus, where S. & P. were joint occupants of land, the title to which was in S. alone; and P., with the knowledge and assent of S., made a mortgage of the land, which S. afterwards treated as a valid and subsisting mortgage, paying part of the money due; it was held, in a suit by the mortgagee for foreclosure and sale against S. & P., that S. was estopped from setting up his title against the innocent mortgagee. *Lee v. Porter*, 5 Johns. Ch. 268. And see *Bruckerhoff v. Lansing*, 4 Johns. Ch. 65; *Green v. Price*, 1 Munf. 449.

<sup>1</sup> As to the doctrine of tacking, see *ante*, ch. 3, § 36, 55, notes.

[† But if a third incumbrancer, having constructive notice of the second mortgage, fails to keep the first security on foot for his protection, he is not entitled to stand in the place of the first mortgagee against the second. *Parry v. Wright*, 1 Sim. & Stu. 369. See also *Toulmin v. Steere*, 3 Mer. 210.]

against all mesne incumbrances, in the same manner as if it had been a term in gross. (a)<sup>1</sup>

\*31. The doctrine, that a term which has been assigned, \*184 upon an express trust to attend the inheritance, may notwithstanding be severed from the inheritance, and assigned to protect a particular incumbrance, has been *confirmed by a court of law.*

32. R. Jones, being seised in fee of several estates, demised the same in 1761 to Aubrey for 999 years, by way of mortgage. In 1768 this term, the money being paid off, was assigned to Lockwood, in trust for Jones, as to the manor of Penmarke, and to attend the inheritance; and as to the other lands, in trust for Lockwood and Morris. In 1767, Jones mortgaged to Morgan, \*and in 1769 to David; both these mortgages \*185 were in fee. In 1769, Jones having borrowed £10,000 from Sprigg, assigned the term to Moreland, in trust for Sprigg; and, by indentures of lease and release, mortgaged the same lands in fee to Sprigg, to secure the £10,000. On the mortgage to Sprigg, all proper searches were made for incumbrances; he had all the title deeds that could be found delivered to him, at the time when he advanced his money, except the demise of the term for 999 years, and the assignments of it, which were kept in the hands of Lockwood, on account only of containing other premises in mortgage to Lockwood, which were not included in the mortgage to Sprigg, nor assigned to Moreland, his trustee; but counterparts of them were then delivered to Sprigg. Morgan and David were in possession, by ejectments brought on their several mortgages. The personal representatives of Moreland, the trustee of the term for Sprigg, brought an ejectment for the recovery of the lands. On the part of Morgan and David, it was contended that the term must be considered as attendant upon the inheritance; consequently, at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance, but by their consent; that if, previous to the conveyance to Sprigg in 1769, Morgan and David had brought ejectments upon

(a) Willoughby v. Willoughby, 1 Term. Rep. 763.

<sup>1</sup> See *ante*, tit. 12, ch. 3, ad calc. 3 Wheat. 224, n.

their mortgages, neither Jones, nor Lockwood his trustee, could have set up this term as a bar to their ejectment. Then, if Jones himself could not set up the term, it was absurd to say that those who claimed under him might; for they could not claim a greater estate than he had. Then Jones, having parted with the inheritance, had no power afterwards to make any appointment of it differently; his power was gone, though it were collateral, by the conveyance of the land.

Mr. Justice Ashurst said: No man ought to be so absurd as to make a purchase, without looking at the title deeds; if he was, he must take the consequence of his own negligence. If the first mortgagee had used ordinary precaution, he must have known that this term was then outstanding; if he did know of it, and neglected to take an assignment of it, that was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*,  
186\* and must \*suffer for the consequences of the fraud; for the lessors of the plaintiff claiming under Sprigg, who had got the legal estate, must be preferred.

Mr. Justice Buller was of opinion that the plaintiffs, having the title deeds, were entitled to recover. (a)

33. A declaration of trust of a term for years, in favor of an incumbrancer, is tantamount to an actual assignment of it to a trustee for him. And the custody of the title deeds respecting a term for years, with a declaration of trust of it, in favor of a second incumbrancer, is equivalent to an actual assignment.

34. Henry Sayer, being seised in fee of certain estates, subject to an outstanding term of years in Rigby and Eyre, by indentures of lease and release, bearing date the 4th and 5th June, 1732, conveyed them to Lady Dysart and her heirs, for securing the payment of £1000, with interest; and covenanted to produce the deeds respecting the terms of years. Afterwards, Rigby and Eyre assigned the term to Cunningham and Clayton, in trust for Sayer, his heirs and assigns; and then Sayer, by indenture dated 19th December, 1732, conveyed the same estates to Mrs. Nash, under whom Lord Verney claimed, by way of mortgage, for securing to her £3000 and interest, with a declaration that Cunningham and Clayton should stand possessed of the term in

(a) Goodtitle v. Morgan, 1 Term R. 755. Vide ante, § 9.



trust for her. The deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to Lady Dysart. Lady Dysart brought an ejectment; Lord Verney defended and set up the term, with a declaration of trust of it, in favor of Mrs. Nash, under whom he claimed. Upon this, Lady Dysart brought her bill in equity. The question was, which should be preferred, Lady Dysart, who had the first declaration of the trust of the term, or Lord Verney, who had the subsequent declaration of the trust, but had the custody of the deeds.

Lord Northington held that a declaration of trust, in favor of an incumbrancer, was tantamount to an actual assignment, unless a subsequent incumbrancer *bonâ fide*, and without notice, procured an assignment. And that the custody of the deeds respecting the term, with a declaration of the trust of it, in favor of a second incumbrancer, was equivalent to an actual \* assignment; and therefore gave him an advantage over \* 187 the first incumbrancer, which equity would not take from him. (a) †

35. If the *first incumbrance only extends to part of the estate* comprised in the latter mortgage, it will only protect that part; but if the first incumbrance extends to estates not comprised in the subsequent mortgages, the puisne mortgagee shall hold all the estates till he is satisfied.<sup>1</sup>

36. A person mortgaged the manor and rectory of D to A, then mortgaged the rectory to B without notice of the mortgage to A; afterwards B purchased in a precedent incumbrance on both the manor and the rectory.

The question was, when B had received all the money due on the first security, whether he should receive any more profits of the manor, or only keep the incumbrance on foot, to protect the rectory. This was argued before Lord Keeper Finch, in the

(a) *Stanhope v. Verney*, 1 Inst. 290 b, n. § 18. 2 Eden, 81.

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† [Lord Loughborough has observed, 6 Ves. 184, that this doctrine has been weakened by some determinations at law, where a satisfied term has not been allowed to be set up in bar to a plaintiff in ejectment. But the law on that point has been since altered. *Vide* tit. 12, c. 3.—Note to former edition.]

<sup>1</sup> But where there are successive mortgages, the first being of two estates and the second of only one of them, the first mortgagee will be obliged to exhaust first the estate not included in the second mortgage, before he can resort to the other. *York & Jersey Steamboat Co. v. Jersey Co.*, 1 Hop. 460.

presence of Wyld and Twisden. The two Judges held, that B should not receive the profits of the manor after the first incumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention. But the Lord Keeper overruled it; for that when he had purchased the precedent incumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reasonable that the estate should not be taken away by the mesne incumbrancer in a court of equity, which by no methods could be evicted at law, unless the person who sought relief would do equity, and pay the whole money due on both securities. (a)

37. It has been long established as a rule in Chancery, that where a mortgagee *buys in an incumbrance*, to protect his estate at law, *on compositions*, he shall be *allowed the full money due on such incumbrances*; and the same shall not be redeemed by the mortgagor, or his heir, till payment of all the money due on such incumbrances; without regard to the beneficial bargains and compositions made by such purchaser. (b)

38. A *distinction* has, however, been made in cases of 188\* this \*kind *between a stranger and a trustee or heir at law*.

For where a *trustee or heir* buys in an incumbrance, he shall be *allowed no more than what he really paid for it, unless* he bought it to protect an incumbrance to which he himself was entitled. But where a *stranger*, who has an incumbrance on an estate, buys in another security, to protect his own, he shall not only hold till he has satisfied his own debt, and has reimbursed himself the money paid for the incumbrance bought in, but even till he has received *all the money and arrears of interest due on the security so bought in*. (c) <sup>1</sup>

(a) Bovey v. Skipwith, 1 Cha. Ca. 201. 1 Ab. Eq. 323.

(b) Ascough v. Johnson, 2 Vern. 66.

(c) Darcy v. Hall, 1 Vern. 49. 2 Atk. 54.

<sup>1</sup> The principle seems to be this, that where the purchaser of a debt or incumbrance sustains a fiduciary relation to the debtor in respect of the same debt or incumbrance, he shall be presumed to have made the purchase pursuant to his duty, and for the benefit of the debtor; and therefore is allowed only what he actually paid. The same principle also applies in all cases where the payment of the debt was the duty of the payer. In this predicament are heirs, sureties, guardians, executors, administrators, agents, and all other persons chargeable as trustees. The law secures the faithfulness of the party, by removing the temptation to defraud. See 1 Story, Eq. Jur. § 316, 322,

39. In the case of judgments or statutes, it is laid down by Sir Joseph Jekyll, that if a puisne mortgagee without notice buys in a prior judgment or statute, and that judgment or statute is extended upon an *elegit*, at a value much under the real, the mesne mortgagee shall not make the puisne mortgagee, who has got in such judgment, account otherwise, or for more than the extended value; nor will the Court of Chancery give any relief against the judgment or statute, but leave the mesne mortgagee to get rid of them, as well as he can, at law. (a)

40. *With respect to the time* when a second or third mortgagee may purchase in a prior incumbrance, it has been long established that this may be done at *any time before the decree*, even *pendente lite*; for it may happen that the second or third mortgagee only discovers the first mortgage by the proceedings in the suit. (b)

41. But where a puisne incumbrancer after the bill brought, and after the first decree made, and after the report, got an assignment of an old judgment and mortgage, hoping thereby to gain a preference to his debt; the Court said: The assignment being *after the decree made*, he *should not profit by it*, or change the order of payment; but must come in according to the order of time of his own incumbrance, without regard to the old judgment and mortgage which he got in after the decree and report. (c)

42. A person bought in an old judgment, after a decree had been made in a cause in which he had been a party with other creditors, and the Master had been directed to inquire into the priority of their demands; he made claim before the Master to have it tacked to his mortgage, thereby to gain a priority, as to which the Master refused to make any report, whereupon he filed \* his bill: one question was, whether he could \* 189 tack the incumbrance, bought in after the decree, to his mortgage.

(a) 2 P. Wms. 494.

(b) Hawkins v. Taylor, 2 Vern. 29. Turner v. Richmond, 2 Vern. 81.

(c) Bristol v. Hungerford, 2 Vern. 524.

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.323; 2 Story, Eq. Jur. § 1211, 1211, a; Phillips v. Vaughan, 1 Vern. 336; Brathwaite v. Brathwaite, Ibid. 335; Long v. Clopton, Ibid. 464; Williams v. Springfield, Ibid. 476; Baldwyn v. Banister, 3 P. Wms. 251, note (A); Francis's Max. 9—11; Forbes v. Ross, 2 Bro. Ch. Cas. 430, note (b) by Perkins.

Lord Hardwicke, (after laying down the general doctrine as already stated,) said, “that if a puisne incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit; for in *Marsh v. Lee* there was a *lis pendens*, yet was not the party affected by it; and so, I take it, in general it would be, notwithstanding a *lis pendens*; because the principle upon which all these cases depend is this, that a man’s having notice of a second incumbrance, at the time of taking in the first, does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third, that will affect him; for then no act that he can do will help him. Then a *lis pendens* is nothing but notice: an actual notice is certainly as good as that by a *lis pendens*; one notice is, in consideration of this Court, as strong as another. Nay, actual notice is stronger than that implied by a *lis pendens*; it will not, therefore, affect him. That was *Marsh v. Lee*, and the other cases which I agree to: but no case is cited wherein a puisne incumbrancer, a party in a cause, and a decree made in that cause for satisfaction of incumbrancers, according to their respective priorities, has taken in a prior, to tack to his puisne incumbrance, that he should be allowed to make use of that in any other shape than that original incumbrancer would be.” He was of the same opinion as Lord Cowper was in the *Earl of Bristol v. Hungerford*, in general; and did think it would be most mischievous and pernicious if the Court should allow the doctrine of *tacking to be carried to that extent.* (a)

191 \* \* 43. In the following case it was determined by the

Court of Chancery, and the House of Lords, that a third or other subsequent mortgagee, after a bill filed for sale of the estate, and payment of all the mortgages, to which the first mortgagee had put in an answer, and submitted that the incumbrances might be discharged according to their respective priorities, might buy in the first mortgage, and thereby gain a priority over the second and other mesne mortgages. (b)

44. John Butler, being seised in fee of some lands in Surrey, mortgaged them to five successive persons, and delivered the title deeds to the fifth mortgagee. Upon the death of the mortgagor,

(a) *Wortley v. Birkhead*, 2 Ves. 571. 3 Atk. 809. Tit. 12, c. 3, § 34, n. *Ante*, § 54.

(b) *Robinson v. Davison*, 1 Bro. C. C. 63. See per Lord Eldon, *Mackreth v. Symmons*, 15 Ves. 335.

the second mortgagee filed a bill in the Court of Chancery against all the other mortgagees, praying that they might set forth their interest in the premises; and that the mortgaged premises might be sold, and the money applied towards the payment of all the incumbrances, in their just order. To this bill all the other mortgagees put in their answer: the first mortgagee submitted that all the incumbrances might be paid according to their respective priorities; and the last mortgagee insisted, that having the title deeds, he ought to be paid immediately. After all these answers had been put in, the last mortgagee purchased in the interest of the first mortgagee, and filed a cross bill, stating this matter, and that by means of the assignment from the first mortgagee, the legal estate in the premises was vested in him; therefore he was entitled to what was due on his own mortgage, preferably to any of the intervening mortgages.

It was decreed by Lord Keeper Henley, that the lands should be applied, first in discharge of all that was due to the last \*mortgagee, as well on account of the first mortgage, \*192 which he had purchased, as on account of his own mortgage. (a)

On an appeal to the House of Peers, the \*decree was affirmed.

\*45. As the principal point upon which the doctrine \*194 of tacking subsequent to prior incumbrances depends is, whether the mortgagee had notice of the prior incumbrance at the time when he advanced his money; it will be necessary to ascertain *what circumstances constitute notice*<sup>1</sup> of a prior incumbrance. (This is often a point of considerable nicety; resolving itself sometimes into matter of fact, and sometimes into matter of law. Hence notice is said to be either *direct* and actual, or inferential and *constructive*.)

46. *Direct notice* is an actual and positive knowledge of a prior incumbrance, regularly and formally communicated to the mortgagee.

47. A *notice given to the counsel, attorney, solicitor, or agent*

(a) *Belchier v. Renforth*, 5 Bro. Parl. Ca. 292. 1 Eden, 523.

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[<sup>1</sup> The notice must be direct and positive or implied; a notice which is barely sufficient to put a party on inquiry, is not enough. *Fort v. Burch*, 6 Barb. Sup. Ct. 60.]

of a mortgagee, is a *sufficient notice* to such mortgagee. But a notice of this kind must be *confined to the same transaction*; for notice in another transaction will have no effect. (a) <sup>1</sup>

48. Where all the *securities are prepared by the same person*, notice to that person will operate as a *notice to all the parties concerned in the transaction*. (b)

195 \* \* 49. A *judgment*, though on record, is *not in itself notice* to a purchaser or mortgagee. For although a purchaser is, at law, bound to take notice of a judgment; yet, in equity, where the cognizee of a judgment claims to be allowed to extend his judgment against a purchaser, who has got a prior term or incumbrance, he must prove express or constructive notice of the judgment, otherwise he will not be relieved. (c)

50. A *memorial of a conveyance*, duly registered in the manner required by the register acts, is *not of itself notice* to a subsequent incumbrancer. (d) <sup>2</sup>

(a) 2 Vern. 574. Gilb. R. 8. 3 Atk. 294.

(b) Treat. of Eq. B. 2, c. 6, § 4. Le Neve v. Le Neve, tit. 32, c. 29.

(c) 1 Cha. Ca. 36. 2 Atk. 275.

(d) Tit. 32, c. 29. Amb. 678.

<sup>1</sup> Lawrence v. Tucker, 7 Greenl. 195; Jackson v. Sharp, 9 Johns. 163; Jackson v. Van Valkenburg, 8 Cowen, 260. Notice to a creditor of a prior conveyance by his debtor, will prevent him from acquiring a title by attachment of the land as the property of the debtor. Priest v. Rice, 1 Pick. 164; Matthews v. Demeritt, 9 Shepl. 312. See further, *post*, tit. 32, ch. 29.

<sup>2</sup> In the United States, the registration of any instrument of title which the law requires to be registered, if the instrument be duly executed, is of itself notice to all subsequent incumbrancers or grantees, claiming under the same grantor. See *post*, Vol. IV. tit. 32, ch. 29, where this subject is further treated. [Moor v. Ware, 38 Maine, (3 Heath,) 496; Pike v. Collins, 33 Ib. (3 Red.) 38. See also Coster v. Bank of Georgia, 24 Ala. 37; DeVendal v. Malone, 25 Ib. 272; Center v. P. & M. Bank, 22 Ib. 743; Dean v. De Lezardi, 24 Miss. 424; Brown v. Kirkman, 1 Ohio State R. 116.] Beside the general statutory provisions for the registration of all deeds of conveyance, there are special provisions, in several of the United States, in regard to mortgages. In some, the provision is in general terms, requiring that all mortgages be registered; without which, it would seem, they would be inoperative as mortgages, whatever rights might exist in equity between the parties. In *New Jersey*, an unrecorded mortgage, though valid between the parties, is of no force against subsequent judgment creditors, or *bonâ fide* purchasers and incumbrancers for valuable consideration, unless it is recorded or lodged with the clerk or register, prior to the entry of judgment or to the registry of the subsequent deed. Elmer's Dig. p. 87. In *Delaware*, a mortgage not recorded within a year from its date, is of no force against subsequent purchasers and incumbrancers *bonâ fide*, for valuable consideration and *without notice*; and mortgages become liens, and have priority *inter sese*, not according to their dates, but according to the time of

51. A person is *not bound* to take notice of an *act of bankruptcy*; for it may be committed in so secret a manner, as not to be easily known. (a)

52. Sir William Grant seems to have doubted whether a person, purchasing a copyhold estate, must be presumed to have notice of everything on the court rolls relating to it. Sir John Leach, V. C., has held that the *court rolls are the title deeds of copyholds*, and that a purchaser is affected with notice of the contents as far back as a search is necessary for the security of the title. (b)

53. [A *private act of parliament* is not notice to strangers, but a public act of parliament is notice to all. (c) So is *lis pendens*, where not collusive; (d) but it is not of itself notice for the purpose of postponing a registered deed, (e) nor to prevent a third mortgagee from obtaining the benefit of the legal estate from the first incumbrancer. (f)]

54. A *decree of a court of equity* is not of itself notice. (g)]

55. Lord Chief Baron Eyre has defined *constructive notice* to be no more than evidence of notice, the presumptions of which were so violent that the Court would not allow even of its being

(a) *Hitchcock v. Sedgwick*, 2 Vern. 157. See Sugd. on Vend. 719, 722, 6th ed.

(b) *Hansard v. Hardy*, 18 Ves. 462. *Pearce v. Newlyn*, 3 Madd. 186.

(c) 2 Vez. 480. 2 Bos. & Pul. 578.

(d) 2 Cha. Ca. 116. 2 Sim. 433. (*Chaudron v. Magee*, 8 Ala. R. 570.)

(e) 19 Ves. 439.

(f) 1 Bro. C. C. 63.

(g) *Worsley v. Scarborough*, 3 Atk. 392.

their registration. Del. Rev. St. 1829, p. 91. In *South Carolina* and *Kentucky*, the same classes of purchasers, including creditors, have priority over mortgages not recorded within sixty days from their execution. S. Car. Stat. 1843, No. 2890, § 1; Kentucky, Rev. St. Vol. I. p. 448. In *Georgia*, a mortgage not recorded within three months from its date is postponed, in favor of all judgments rendered before the foreclosure of the mortgage, and all subsequent mortgages duly recorded. LL. Georgia, p. 420, Hotchkiss's Dig. In *New York*, every conveyance not recorded, is void against subsequent purchasers in good faith, for valuable consideration, whose deeds are duly recorded. LL. N. York, Part 2, ch. 3, § 1, Vol. II. p. 40, 3d ed. [As between parties a mortgage is valid without registration. *Leggett v. Bullock*, Busbee, Law, (N. C.) 283; *Fosdick v. Barr*, 3 Ohio, N. S. 471. And is valid as against subsequent purchasers with notice. *Dearing v. Watkins*, 16 Ala. 20. But the registration of a mortgage, without an acknowledgment or proof, according to the statute, is a nullity, and conveys no notice. *Work v. Harper*, 24 Miss. 517; *White v. Denman*, 1 Ohio State R. 110.

And where a recorded mortgage is discharged by a person not the mortgagee, a subsequent incumbrancer is bound to inquire what authority he had to discharge it, and is chargeable with notice of such facts, as by proper inquiry he could have ascertained. *Swartwout v. Curtis*, 1 Selden, 301.]

controverted. And Mr. Fonblanque has observed that it would be extremely difficult to extract from the cases any general \*196 rule \*on this subject. It seemed, however, to be held, that every man shall have notice of the instrument under which the party with whom he contracts, as executor or trustee, derives his power. It seemed also agreed, that where a purchaser could not make out a title, but by a deed which led him to another fact, he should be presumed to have notice of such fact.<sup>1</sup> So whatever was sufficient to put a party on inquiry, was good notice in equity. (a)

56. It is laid down by Lord Eldon, in a modern case, that the *possession of a tenant is constructive notice* to a purchaser of the actual interest he may have, either as tenant, or under an agreement to purchase the premises. (b)

(a) *Plumb v. Fluitt*, ante, § 13. Treat. of Eq. B. 3, c. 3, § 1. *Surman v. Barlow*, 2 Eden, 165.

(b) *Daniels v. Davison*, 16 Ves. 249. 17 Ves. 433.

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<sup>1</sup> See further, as to notice, *post*, tit. 32, ch. 29, § 20, note, where this rule is qualified, and the subject is treated more at large.



## CHAP. VI.

## FORECLOSURE.

SECT. 1. <i>Nature of.</i>	SECT. 11. <i>Married Women are bound by</i>
5. <i>A Foreclosure binds an En-</i>	<i>it.</i>
<i>tail.</i>	12. <i>Decrees of Foreclosure some-</i>
7. <i>How far Infants are bound</i>	<i>times opened.</i>
<i>by it.</i>	14. <i>A Sale sometimes decreed.</i>

SECTION 1. As the courts of equity allowed persons who had mortgaged their lands to redeem them, long after the time of payment was passed, and the condition forfeited at law, it became also necessary to establish certain rules for enabling mortgagees to determine and destroy the right of redemption. This may be done after the day of payment is past, by the mortgagee's filing a *bill of foreclosure*; that is, by his calling on the mortgagor, in a court of equity, to redeem his estate presently; or in default thereof, to be forever foreclosed, and barred from any right of redemption.<sup>1</sup>

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<sup>1</sup> The methods of foreclosing mortgages in the United States are various; but subject to some diversities in the details of proceedings, not within the scope of these notes to be mentioned, they may be arranged into these classes:—*First*, by *bill in Chancery*, under the general and inherent jurisdiction of Courts of Equity. Here an interlocutory decree is passed, for the payment of the money into court, by a day limited, either by the Court, in its discretion, or, as in some cases, by statute; on default of which the land is decreed to be sold by the Master, and the money being brought into court, the debt is paid, with the costs, and the balance, if any, is delivered to the debtor. See 4 Kent, Comm. 182—186; Elmer's Dig. LL. *New Jersey*, tit. Chancery, p. 62, § 57; *New York*, Rev. St. pt. 3, ch. 1, tit. 2, art. 6; [Potter v. Rowland, 4 Selden, (N. Y.) 448;] LL. *Maryland*, Vol. I. p. 208, Dorsey's ed.; *Vermont*, Rev. St. 1839, ch. 24, § 23; *South Carolina*, Stat. at Large, Vol. IV. p. 642; *Michigan*, Rev. St. 1837, p. 376; *Indiana*, Rev. St. 1843, ch. 29, § 32, 33, 34; *Missouri*, Rev. St. 1845, ch. 122; *Alabama*, Toulm. Dig. p. 487; [Carradine v. O'Connor, 21 Ala. 523;] Thompson's Dig. LL. *Florida*, p. 380. So, in *Virginia*, 1 Lomax, Dig. tit. 13, ch. 6, p. 397, and in some other States. In some States, the Court exercising Chancery powers, may decree a strict foreclosure, whereby the title becomes absolute in the mortgagee, on the failure of the mortgagor to redeem the land within the time expressed in the decree. See Dutton's Dig. LL. *Connecticut*, p. 515, 516; *Derby Bank v. Landon*, 3 Conn. R. 62; *Swift v. Edson*, 5 Conn.

2. A mortgagee brought his bill against the mortgagor to compel him, as tenant in tail, to make a good title, by suffering a

R. 531. [Johnson v. Donnell, et. al. 15 Illinois R. 100.] In *Maryland*, if the mortgagor is an infant, or *non compos mentis*, the Court may decree either a sale or a strict foreclosure, in whole or in part, at its discretion. LL. *Maryland*, *ubi supra*.

In *Michigan* and *Indiana*, the Court of Chancery is authorized by statute, when the proceeds of sale are insufficient, to render judgment for the balance of the debt, and issue execution therefor, as at common law. In *Arkansas*, and, as it seems, in *Louisiana*, the Court renders judgment for the whole debt, and also for foreclosure and sale; and if the proceeds of sale are insufficient, execution issues for the balance, as in ordinary cases. But in *South Carolina* and *Missouri*, this may be done only by the court of common law, on petition, under the statute, Chancery having power only to proceed according to the usual course of Chancery. See LL. *Michigan*, *Missouri*, and *Indiana*, *ubi supra*; LL. *South Carolina*, Vol. V. p. 169, 170; *Arkansas*, Rev. St. 1837, ch. 101. See also *Louisiana* Civ. Code, art. 3361. In *Connecticut*, a strict foreclosure is held a complete extinguishment of the mortgage debt. Kent v. Edson, 5 Conn. R. 531. But in *Massachusetts*, *Maine*, *New Hampshire*, *Maryland*, and several other States, it is held only a payment *pro tanto*; and the creditor may recover the balance of the debt in a suit at law, the value of the land, when foreclosed, being estimated by the jury. Amory v. Fairbanks, 3 Mass. 562; West v. Chamberlain, 8 Pick. 336; Portland Bank v. Fox, 1 App. 99; Hunt v. Stiles, 10 N. Hamp. 466; Doe v. McLosky, 1 Ala. 708; Spencer v. Harford, 4 Wend. 381; Andrews v. Scotton, 2 Bland, 629; Hatch v. White, 2 Gall. 152; Globe Ins. Co. v. Lansing, 5 Cowen, 380; Lansing v. Goelet, 9 Cowen, 346; Omaly v. Swan, 3 Mason, 474; Hedge v. Holmes, 10 Pick. 380, 381; Hughes v. Edwards, 9 Wheat. 489. And see 1 Daniell's Ch. Pr. 331, note by Perkins; Post, § 12, note. [If a mortgagee foreclose his mortgage, his debt becomes by that act extinguished to the extent of the value of the land at the time of the foreclosure; and any other collateral security which he may hold for the same debt, becomes thereby exonerated to the same extent. Smith v. Packard, 19 N. H. 575. If lands are mortgaged as one entire lot, and are afterwards subdivided by the mortgagor into parcels, the mortgagee, upon foreclosure, is not bound to advertise and sell in parcels, but may sell as one undivided lot, by the description in the mortgage. Lamerson v. Marvin, 8 Barb. Sup. Ct. 9.]

*Secondly.* By sale under a power for that purpose in the mortgage deed, or in a contemporary instrument, duly authenticated and registered. Such a power, being coupled with an interest, is irrevocable and inextinguishable; and a sale under it divests the title of the mortgagor as well in equity as at law, absolutely and forever. In *Massachusetts*, and some other States, this subject remains as at common law; but in others it is regulated by particular statutes, prescribing the manner of sale, and limiting the power of the creditor, in order to prevent oppression and undue advantage. See *New York*, Rev. St. pt. 3, ch. 8, tit. 15, 3d ed.; [Stanton v. Kline, 1 Kernan, (N. Y.) 196, S. C. 16 Barb. Sup. Ct. 9; Bunce v. Reed, Ib. 347; Cohoes Co. v. Goss, 13 Ib. 137; King v. Duntz, 11 Ib. 191.] *Michigan*, Rev. St. 1837, p. 499, St. 1843, No. 75; *Indiana*, Rev. St. 1843, ch. 29, § 51—53; *Mississippi*, Stat. Feb. 21, 1840, § 7.

*Thirdly.* By entry under process of law, sued out for this purpose by virtue of statutes regulating such proceedings. This may be done in *Maine*, *New Hampshire*, *Massachusetts*, *Rhode Island*, and *Vermont*, by process sued out at any time after breach. [The assignee of two mortgages of the same land, made by the same mortgagor at different times, to different mortgagees, may unite them in one action of foreclosure, and recover

recovery. Mr. Justice Wright, sitting at the Rolls, said he did not apprehend that the Court would point out what title the

thereon a conditional judgment, specifying the amount due on each. *Peirce v. Balkam*, 2 Cush. 374.] So, in *Pennsylvania* and *Delaware*; except that in these States process is not to issue until twelve months after breach. [*Wilson v. McCullough*, 19 Penn. (7 Harris,) 77; *Larimer's Appeal*, 22 Ib. (10 Harris,) 41; *Perry's Appeal*, Ib. 43.] In *Georgia*, the course is by petition, and a rule for payment of the money in six months; after which, if the money is not paid, an order is made for sale of the land. In *Florida*, the same general object is effected by a provision that the process shall be served four months before the return day; at which time, if no good cause is shown, the Court is bound to render judgment for the debt and also for foreclosure. In the New England States above mentioned, except *New Hampshire*, a time is limited by statute or in the decree, within which the debtor may pay the money and prevent the issue of the writ of possession. In *Maine*, *Massachusetts*, and *Rhode Island*, this statute period is two months.

*Fourthly.* By entry *en pais*, openly and peaceably made, and without process of law. This method may be pursued in *Maine*, *Massachusetts*, *New Hampshire*, and *Rhode Island*. In the two former States, the entry must be made in the presence of two witnesses, and verified by their affidavit, duly recorded [within thirty days of the entry,] or by consent of the mortgagor, indorsed on the back of the deed. [If the mortgagor has conveyed the right of redemption, the consent of such grantee must be obtained. *Chase v. Gates*, 33 Maine, (3 Red.) 363. Before the Rev. Stat., if a mortgagee entered into possession of the premises under a deed of demise and lease from the mortgagor for one year, and if he claim to hold afterwards to foreclose, he must notify the party entitled to redeem. *Ayres v. Waite*, 10 Cush. 72. An entry to foreclose by a mortgagee on one of two separate tracts of land, both situated in the same county, and mortgaged by the same deed, on the same condition, is an entry as to both. *Bennett v. Conant*, 10 Cush. 163. A mortgagor who signs a certificate on the mortgage of a lawful entry on the mortgaged premises, cannot deny the fact of such entry. *Ibid.* Nor can the effect of such entry be avoided by proof that the mortgagee did not actually go on the land. *Oakham v. Rutland*, 4 Cush. 172. See also *Lawrence v. Fletcher*, 10 Met. 344. A mortgagee who has duly taken possession of the mortgaged premises for the purpose of foreclosure, need not continue in actual occupation and use of the premises in order to bar the right of redemption in three years; the mortgagor, or any one under him, not being in occupation during said time. *Bennett v. Conant*, 10 Cush. 163. And if he has duly taken actual possession thereof, for breach of condition, for the purpose of foreclosure, the mortgage becomes absolute at the end of three years from such entry, although the mortgagor afterwards remains in the occupation of the premises, in the same manner as before for a longer period than three years. *Swift v. Mendell*, 8 Ib. 357.]

Where a mortgagee quitclaimed his interest in a portion of the mortgaged premises, and subsequently duly entered, with the knowledge of the mortgagor, on the mortgaged premises, for breach of condition and for the purposes of foreclosure, but the certificate of entry, indorsed on the deed and duly recorded, did not state on what part of the premises the entry was made, it was held that such entry, with the continued possession of the grantee of the part conveyed to him for three years after the entry, constituted a perfect foreclosure of the mortgage as to that part of the premises held by the latter. *Raymond v. Raymond*, 7 Cush. 605.

In *Maine*, it is held that the possession must be actual, and is not proved by the consent, in writing, of the mortgagor that the mortgagee may enter, and that possession is

mortgagor should make, but would decree him to make such title to the mortgagee as he was capable of doing; and, therefore,

thereby given. *Chamberlain v. Gardiner*, 38 Maine, (3 Heath,) 548. See also *Pease v. Benson*, 28 Maine, (15 Shep.) 336.]

In *Rhode Island*, also, two witnesses are requisite; who only give a certificate of the fact to the mortgagee, to be recorded in like manner. In *New Hampshire*, notice of the fact of entry is required to be published in the newspapers.

The possession of the mortgagee, in either of these cases of entry, must have been continued during the whole period, in order to effect a strict foreclosure. If it is restored to the mortgagor, the entry is waived. *Botham v. McIntier*, 19 Pick. 346. [The commencement of a suit by a mortgagee in possession to foreclose the mortgage by action, is not an abandonment of the possession. *Page v. Robinson*, 10 Cush. 99; *Merriam v. Merriam*, 6 Cush. 91.]

*Fifthly*. In *Maine*, if the mortgagee elects not to take possession, a mortgage may be foreclosed without entry, by an advertisement in the newspapers, or by a notice to the mortgagor, served by the sheriff, stating his title and claim with due particularity, and the breach of the condition, by reason whereof he claims to foreclose the mortgage.

And wherever a foreclosure may be made by entry, in the preceding cases, if the mortgagee is already in possession, a notice that he thenceforth holds for breach of the condition, and for foreclosure, is equivalent to an actual entry *de novo*.

After an entry for the purpose of strict foreclosure, whether made under process, or *en pais*, and after advertisement instead of entry, as last mentioned, the mortgagor is in several of the States allowed a term of time, fixed by statute, within which he may still redeem the land by payment of the mortgage money with interest and legal costs. This period, in *Maine*, *Massachusetts*, and *Rhode Island*, is three years. [In *Maine*, when the foreclosure is by advertisement in the newspapers, the three years begin to run from the date of the last publication. *Holbrook v. Thomas*, 38 Maine, (3 Heath,) 256.] In *New Hampshire*, it is one year. In most other States, where the foreclosure is by sale, under a judgment or decree, the sales are generally made as in the case of lands sold under executions at common law; and are redeemable in like manner.

The foreclosure of a mortgage in any of the preceding modes, is also affected, in some of the States, by any proceedings at law for recovery of the debt. In *Massachusetts*, a subsequent judgment at law for the balance of the debt, opens the foreclosure. Rev. Stat. 1836, ch. 107, § 33. In some other States, the mortgagee, if he has proceeded at law for the debt, can have no decree of foreclosure unless the execution is returned not fully satisfied. In *Indiana*, it must also be certified by the sheriff that the debtor has no other estate except the mortgaged land. Ind. Rev. St. 1843, ch. 29, § 38.

The foregoing provisions will be found in Mass. Rev. Stat. 1836, ch. 107; Maine, Rev. St. 1840, ch. 125; N. Hamp. Rev. Stat. 1842, ch. 131; Vermont, Rev. St. 1839, ch. 24; R. Island, Rev. St. 1844, p. 197—199; N. York, Rev. St. pt. 3, ch. 1, tit. 2, art. 6; Ib. pt. 3, ch. 8, tit. 15; Ib. pt. 2, ch. 3, § 48; Ib. ch. 1, tit. 5, § 5; Elm. Dig. tit. Chancery, § 57, p. 62; Ib. p. 85—87; Ib. tit. Conveyances, p. 31—37, 40; LL. Pennsylv. by Dunlop, p. 23; Del. Rev. St. 1829, p. 91, 92, 206; LL. Maryl. by Dorsey, Vol. I. p. 208; LL. S. Car. Vol. IV. p. 642, Vol. V. p. 169, 170; LL. Georgia, by Hotchkiss, p. 420, 621, 622; LL. Florida, by Thompson, p. 376, 377, 380; Mich. Rev. St. 1837, p. 376, 378, 499, 501. (But see further, as to time of redemption, Stat. 1839, No. 115, § 20; Stat. 1840, No. 91; Stat. 1843, No. 75, § 8—11.) LL. Ohio, 1841, p. 266—268; Walker's Introd. p. 302—305, 602; Indiana, Rev. St. 1843, ch. 29; Illinois, Rev. St.

directed a good title to be made by the defendant to the plaintiff; and the principal, interest, and costs, to be paid in six months, or the defendant to stand absolutely foreclosed. (a)

3. A mortgagee *may bring an ejectment at the same time that he has a bill of foreclosure depending* in Chancery. But special circumstances may arise which will take the case out of the common rule, and induce the Court to grant an injunction to stay the proceedings at law. (b)

\*4. In *Welsh mortgages*, where no precise time is fixed \*198 for redemption, there can be *no foreclosure*, although the mortgagor may redeem at any time. (c)

5. Where an equity of redemption is entailed, a decree of foreclosure will bind all persons claiming under such entail.

(a) *Sutton v. Stone*, 2 Atk. 101.

(b) *Booth v. Booth*, 2 Atk. 343. 7 Term R. 185.

(c) 1 Ves. 406.

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1839, p. 393; Stat. Feb. 19, 1841, p. 172; Missouri, Rev. St. 1845, ch. 122; Mississippi, Rev. St. 1840, ch. 34; Alabama, Toulm. Dig. p. 487; Arkansas, Rev. St. 1837, ch. 101.

An entry, in order to foreclose a mortgage, must have been made with that intent. If made on any other ground, opposed to the mortgage title, it cannot afterwards be justified under the mortgage. *Merithew v. Sisson*, 3 Kerr, N. B. Rep. 373.

It is further to be observed, that the entry of the mortgagee, whether made *en pais*, or asserted by an ejectment, must be made within the period fixed in the statutes of limitation respecting entries and ejectments. See 4 Kent, Comm. 187, 188. It may also be barred, even in equity as well as at law, by such lapse of time or other circumstances, as raise a presumption of payment. *Ibid.* 2 Story, Eq. Jur. § 1028, a, b; Angell on Limitations, ch. 6.

There can be no foreclosure of part only of the premises; but if the mortgagor has a right to redeem any part, he may redeem the whole. *Spring v. Haines*, 8 Shepl. 126.

In taking the account, in a bill of foreclosure, the course is, to compute the interest and the charges down to the time of the report. *Holabird v. Burr*, 17 Conn. R. 556. [In New Hampshire, the conduct of the agent of the mortgagee having been unconscientious and oppressive towards the mortgagor, it was held that the mortgagor in his bill to redeem was entitled to costs. *McNeil v. Call*, 19 N. H. 403. Where a mortgagee in possession for foreclosure neglects to render an account of rents and profits when legally demanded so to do, and claims a greater sum than is due upon the mortgage, he is liable for costs in the suit to redeem. *Sprague v. Graham*, 38 Maine, (3 Heath,) 328.]

Where the debt is payable by instalments, a bill of foreclosure may be filed on default of the first payment. *Lansing v. Capron*, 1 Johns. Ch. R. 617. But whether the plaintiff may proceed to a complete foreclosure before another default, does not seem to be perfectly agreed. That he may, see *Salmon v. Claggett*, 3 Bland, 126; *Kimmell v. Willard*, 1 Doug. Mich. R. 217. But the course elsewhere deemed most consonant with the rules of equity is to require the defendant to pay the instalment fallen due, with the costs, and to put in an answer, confessing the debt, and consenting to a decree

6. A person having made a mortgage, afterwards settled the equity of redemption on himself for life, remainder to his issue in tail, remainder to his brother in tail. The mortgagee exhibited his bill against the mortgagor to foreclose, without making his brother a party, and obtained a decree for that purpose. Upon the death of the mortgagor without issue, his brother filed his bill to redeem. (a)

The cause was heard before Lord Keeper Finch, assisted by Lord Chief Justice Hale, Wyld, and Wyndham. It was insisted for the defendant, that the deed under which the plaintiff claimed was voluntary; that although a voluntary conveyance would pass an equity of redemption, yet, in this case, where the plaintiff claimed an equity of redemption by way of entail, it ought not to be countenanced in equity; for the consequence would be, to make an equity of redemption perpetual.

Lord Chief Justice Hale said, that "by the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed; and was of opinion there was no color for a decree. In 14 Richard II. the parliament would not admit of redemption; but now there is another settled course. As far as the line is given, man will go; and if an hundred years are given, man will go so far; and we know not whither we shall go. An equity of redemption is transferable from one to another now, and yet at common law if he that had the equity made a feoffment or levied a fine, he had extinguished his equity at law; and it hath gone far enough already, and we will go no further than precedents in the matter of equity of redemption, which hath too much favor already; and concluded there should be no decree for the plaintiff: and a decree to foreclose a tenant in tail shall

(a) *Roscarrick v. Barton*, 1 Cha. Ca. 217. *Reynoldson v. Perkins*, Amb. 564.

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of foreclosure, to remain subject to the order of Court upon a subsequent default. *Lansing v. Capron*, *supra*. And see *Caufman v. Sayre*, 2 B. Monr. 204; *Adams v. Essex*, 1 Bibb, 150; *Day v. Cushman*, 1 Scam. 475; 3 Pow. on Mortg. 903, notes, by Coventry & Rand. In *New York*, it is now provided by statute, that upon payment of the instalment due, with costs, the bill shall be dismissed. 2 Rev. St. p. 255, § 211, 3d ed. And see *acc. Massina v. Bartlett*, 8 Port. 277; *Walker v. Hallett*; 1 Ala. R. 379, N. S.

[Where the condition of a mortgage was that the principal should become payable upon the failure to pay an instalment of interest when due, a neglect to pay such instalment when due, works a forfeiture of the mortgage. *Ottawa N. R. R. Co. v. Murray*, 15 Ill. 336.]

bind his issue in an equity of redemption, because that is a right only set up in a court of equity, and so may be here extinguished." The Lord Keeper concurred in opinion, and the bill was dismissed. (a)

7. A decree of *foreclosure* may be obtained against an infant. But in all such decrees *a day is given* to the infant to show *\* cause against it, within six months after he attains his* \* 198 *age of twenty-one years.*<sup>1</sup> If he does not show any cause within that time, the decree is made absolute upon him; but he may upon motion put in a new answer, and make a new defence. (b)

8. In a case of this kind, though the infant has six months after he comes of age to show cause against the decree, yet he *will not be allowed to open the account.* Nor is he entitled to redeem the mortgage by paying what is reported due; but is *only permitted to show an error in the decree.* (c)

9. Where the validity of a mortgage depended on a disputable title,—namely, whether the ancestor of the infant had properly executed a power from which his right to mortgage arose; the Court would not decree the infant to be foreclosed, till he came of age. (d)

10. It has been determined in a modern case, that where a bill prayed a foreclosure against an infant, and the mortgagees *consented to a sale, an inquiry should be directed* whether it would be for the *benefit of the infant.* Lord Eldon said it would be too much to let an infant be foreclosed, when, if the mortgagee would consent to a sale, a surplus might be got for the infant. And if there was no precedent, he would make one. (e)

11. *A married woman is bound by a decree of foreclosure; and has no day given to her or her heirs to show cause against the decree, after the coverture is determined; for, having by her own act delegated her power to her husband, she must be liable to all the consequences of his neglect.* (f)

(a) Roscarrick v. Barton, 1 Cha. Ca. 217. Reynoldson v. Perkins, Amb. 564.

(b) 3 P. Wms. 401.

(c) 3 P. Wms. 352.

(d) Sale v. Freeland, 2 Vent. 351.

(e) Monday v. Monday, 1 Ves. & B. 223.

(f) 3 P. Wms. 352.

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<sup>1</sup> This indulgence is granted to the infant only in cases of strict foreclosure. If there is a decree for the sale of the mortgaged premises, the infant is bound by the sale. Mills v. Dennis, 3 Johns. Ch. R. 367.

12. The Court of Chancery has, in some cases, opened decrees of foreclosure, and allowed the mortgagor further time to redeem his estate. But no general rule can be laid down in this matter, as every case must depend on its own peculiar circumstances.<sup>1</sup>

<sup>1</sup>In one case the decree of foreclosure was opened after sixteen years, the equity of redemption being worth much more than was due upon the account, and the mortgagor having been distressed. *Burgh v. Langton*, 15 Vin. Abr. 476; 2 Eq. Cas. Abr. 609. In other cases, relief has been granted on fresh evidence adduced on behalf of the mortgagor. *Cocker v. Bevis*, 1 Ch. Cas. 61; *Ismood v. Claypool*, 1 Ch. Rep. 262.

There are also certain acts of the mortgagee, which, it is said, will of themselves open the decree; as, if the decree has been obtained by fraud or unfair conduct on his part. *Loyd v. Mansell*, 2 P. Wms. 73; *Gore v. Stackpole*, 1 Dow, 18; *Harvey v. Tebutt*, 1 Jac. & Walk. 197. Whether subsequently proceeding at law to recover the debt, will have that effect, is not perfectly clear. In England, it seems that it will amount to a waiver of the foreclosure. *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317, pl. 3; 3 Pow. on Mortg. 1002—1006, by Coventry, note (1), and cases there cited.

But in the United States, it is held that a suit at law, or the acceptance of part of the mortgage money, may or may not open the foreclosure, according as, in connection with the circumstances, it may be satisfactory evidence of an admission on the part of the creditor, that he still regarded the land as a mere security for the money. *Lawrence v. Fletcher*, 10 Metc. 344, 347. If he accepts the whole amount of the debt, it is conclusive evidence that the foreclosure is waived. *Batchelder v. Robinson*, 6 N. Hamp. R. 12. So, if a second entry to foreclose is made, it is a waiver of the first. *Fay v. Valentine*, 5 Pick. 418. And see *Dexter v. Arnold*, 1 Sumn. 109, 118. So, a receipt of part of the money, and a contemporaneous lease for a year from the mortgagee to the mortgagor, reserving to the latter "all the right in equity to redeem said premises which he now has," was held a waiver of the foreclosure. *Deming v. Comings*, 11 N. Hamp. R. 474, 483. But the receipt of part of the money, alone, and without other circumstances, has not that effect. *Lawrence v. Fletcher, supra*; 8 Met. 153, S. C.

The question whether, after foreclosure, the creditor may proceed at law upon the bond or other security given for the money, has been much discussed both in England and in the United States. A distinction has been taken between the cases where the land remained in the hands of the mortgagee, and where it had been sold to a stranger. But this distinction is now exploded in this country; and the better opinion is, that after a foreclosure, whether with or without a sale, the mortgagee may sue at law for the balance remaining due to him, the land being deemed payment *pro tanto*, according to its value as found by the jury. See 4 Kent, Comm. 182, 183. In *Hatch v. White*, 2 Gall. 152, this point was elaborately considered, and the authorities reviewed, by Mr. Justice Story, and decided in favor of the mortgagee. See also 3 Pow. on Mortg. 1002, note (1), by Mr. Rand; *Tooke v. Hartley*, 2 Bro. Ch. Cas. 125, and notes by Mr. Perkins; *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Lansing v. Goelet*, 9 Cowen, 346; *ante*, § 1, note 1, and cases there cited. [*Porter v. Pillsbury*, 36 Maine, (1 Heath,) 278; *Paris v. Hulett*, 26 Vt. (3 Deane,) 308.]

But it has been recently held in England that if the mortgagee, after foreclosure, sells the estate for less than was due to him, he cannot recover the balance, in a suit at law; that he may pursue all his remedies, both at law and in equity, at the same time; and that if he obtains part payment at law, he may go on with his foreclosure bill for the residue; and that if he foreclose first, and the value of the estate is less than is due



13. [It is *not of course to enlarge the time* for foreclosing the mortgage, though the interest be paid up and costs. The Court of Chancery, in order to induce it to enlarge the time, must have some reason assigned, (though it does not require a very strong one,) why the mortgagee did not pay interest, principal, and costs, at the time appointed by the report. (a)]

14. Where the estate mortgaged is reversionary, and in many other cases, the prayer of the bill is, that the *estate may be sold*, and the mortgagee paid his principal, interest, and costs; in which case, if there be a surplus, it goes to the mortgagor (b)<sup>1</sup>

(a) Quarles v. Knight, 8 Pri. 630. Nanny v. Edwards, 4 Russ. 124. (*Ante*, ch. 3, § 89, note.)

(b) Perry v. Barker, 13 Ves. 198.

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to him, he may, *while the estate remains in his power*, sue on the bond or covenant; but that such suit will open the foreclosure and admit the mortgagor to redeem. Lockhart v. Hardy, 9 Beav. 349; 10 Jur. 532.

<sup>1</sup> It is not a matter of course to order the whole to be sold. If the estate can be conveniently divided, and the value is greater than the debt, no more ought to be sold than will pay the debt and costs. Delabigarre v. Bush, 2 Johns. 490.

All sales under a decree of foreclosure, are made before a Master, or under his direction. 2 Daniell's Ch. Pr. 1447, 1448, by Perkins. But in *New York*, the terms of the statute are deemed to require the master's presence at the sale. Heyer v. Deaves, 2 Johns. Ch. R. 154.

If the mortgagor, subsequent to the mortgage, has sold the premises in lots, to several purchasers, at different periods, the Court will direct the sale of the lots in the order in which they were sold, beginning with the last, and proceeding in the order of their dates to the first conveyance. Stoney v. Shultz, 1 Hill, Ch. R. 500; Cushing v. Ayer, 12 Shepl. 383. See further, on the subject of sales, *ante*, § 1, note.

[The agent of a mortgagee agreed that if the mortgage debt should be paid by a certain time subsequent to its becoming due, no advantage should be taken of a foreclosure, and a tender of the amount was made in accordance with the agreement, it was held that the forfeiture was waived and the foreclosure opened. McNeil v. Call, 19 N. H. 403.]

## TITLE XVI.

## REMAINDER.

## BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 11.

KENT'S COMMENTARIES. Vol. IV. Lect. 59.

CHIEF BARON GILBERT. Treatise on Remainders and Reversions. This treatise is contained in Mr. Gwillim's edition of Bacon's Abridgment, under the title of Remainder. See his Preface; and 4 Kent, Comm. 235, note.

CHARLES FEARNE. Essay on the Learning of Contingent Remainders, &c. Butler's edition, with notes by J. W. Smith, 1844.

WM. F. CORNISH. Essay on the Doctrine of Remainders, &c.

RICHARD PRESTON. Tracts on Cross-Remainders, &c.

The Same. Essay on Estates. Vol. I. p. 89—123.

FLINTOFF. On Real Property. Vol. II. Book I. ch. 4, § 2.

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## NATURE AND DIFFERENT KINDS OF REMAINDERS.

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## OTHER MATTERS RELATING TO REMAINDERS.

## CHAP. I.

## NATURE AND DIFFERENT KINDS OF REMAINDERS.

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- 8. *Vested Remainders.*
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- 11. *Different kinds of.*
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- 33. *Limitation to the right Heirs of the Grantor.*
- 34. *Heir sometimes a Descriptio Personæ.*
- 35. *What Kind of Uncertainty renders a Remainder contingent.*
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SECT. 49. *Two contingent Fees may be limited in the Alternative.*

- 56. *But no Estate after a Remainder in Fee can be vested.*
- 60. *Unless it be a contingent determinable Fee.*
- 62. *A Power of Appointment does not suspend Remainders.*
- 63. *Effect of a Contingency annexed to a preceding Estate.*
- 75. *Adverbs of Time only denote the Period when a Remainder is to vest in Interest.*
- 83. *A Contingency sometimes considered as a Condition subsequent.*

SECTION 1. We now come to consider estates with regard to the time of their enjoyment, as they are either in possession or expectancy. *Estates in possession* are those where the tenant is entitled to the actual pernanity of the profits. *Estates in expectancy* are those where the right to the pernanity of the profits is postponed to some future period; and are of two sorts, namely, estates in *remainder*, and estates in *reversion*.†<sup>1</sup>

2. An estate in remainder may be defined to be “an estate

† [It would be impossible to treat of this title without transcribing many parts of Mr. Fearn's excellent work on Contingent Remainders. The reader will, however, observe that the cases are in general more fully stated. Note by Mr. Cruise.]

<sup>1</sup> The learning of remainders is treated with great perspicuity and depth of research, in the admirable Commentaries of Chancellor Kent, Vol. IV. Lect. 59, to which the student, desirous of mastering this abstruse subject, will not fail to direct his diligent attention.

limited to take effect, and be enjoyed, after another estate is determined.”<sup>1</sup> As if a man, seised of lands in fee simple, grants them to A for twenty years, and after the determination of that term, to B and his heirs forever. Here A is tenant for twenty years, with remainder to B in fee. (a)

3. In the above case, an estate for years is created or carved out of the fee, and given to A, and then the residue or remainder of the estate is given to B. Both these estates are, however, but *one estate*; the present term for years, and the remainder after, when added together, being equal only to one estate in fee. They are different parts, constituting one whole, being carved out of one and the same inheritance; they are both created and subsist at the same time, the one in possession, and the other in expectancy. (b)

4. Lord Coke has defined a remainder to be—“A remnant of an estate in lands or tenements expectant on a particular estate created together with the same, at one time.” From 203\* which it follows, that wherever the whole fee is first limited, there can be no remainder in the strict sense of that word; for the whole being first disposed of, no remnant exists to limit over.<sup>2</sup> Thus, if lands are limited to a person and his heirs, and if he dies without heirs, that they shall remain over to another, the last limitation is void.<sup>3</sup> (c)

5. A person devised lands in London to the prior and convent of St. Bartholomew, and their successors, so as they paid

(a) (2 Bl. Comm. 163. 2 Flintoff on Real Property, p. 255.)

(b) (Wymply v. Fonda, 2 Johns. 288.) (c) 1 Inst. 143, a. 1 Ab. Eq. 186.

<sup>1</sup> Chancellor Kent has defined a remainder to be—“A remnant of an estate in land, depending on a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it.” 4 Kent, Comm. 197. In the statutes of *New York*, a remainder is defined as “an estate limited to commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.” Rev. St. Vol. II. p. 9, § 10, 11, 3d ed.

<sup>2</sup> In *New York*, a fee may be limited upon a fee, upon a contingency which, if it should occur, must happen within two lives in being at the creation of the estate. Rev. Stat. Vol. II. p. 10, 11, § 15—24. So, in *Indiana*, Rev. St. 1843, ch. 28, § 59.

<sup>3</sup> Wherever the first grantee has the absolute right of disposal, a limitation over is void, being inconsistent with such right. As, if there be a devise to A and his heirs forever, a devise over of what he should leave, if he should die without heirs, is void. *Ide v. Ide*, 5 Mass. 500; *Jackson v. Delaney*, 13 Johns. 537; *Riddick v. Cahoon*, 4 Rand. 547; *Burbank v. Whitney*, 24 Pick. 146; *Cox v. Marks*, 5 Ired. 361.

annually sixteen marks to the dean and chapter of St. Paul; if they should fail of payment, that their estate should cease, and the dean and chapter should have it. Held, that the limitation over was void as a remainder, because, the first devise, carrying a fee, nothing remained to be disposed of. (a) <sup>1</sup>

6. In the case of a *qualified or base fee*, no remainder can be limited upon it. Thus, Lord Coke says, if lands be given to A and his heirs, so long as B has heirs of his body, remainder over in fee, the remainder is void. But since the Statute *De Donis*, a remainder may be limited after an *estate tail*. (b)

7. Lord Chief Baron Gilbert says, the word *remainder* is *no term of art*; nor is it necessary to create a remainder, for any other word sufficient to show the intent of the party will create it; because such estates take their denomination of remainders more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word *remainder*, to make them such. Therefore, if a man gives lands to A for life, and that after his death the land shall revert and descend to B for life, &c., this is a good remainder. (c)

8. Remainders are either *vested* or *contingent*.† *Vested remainders*, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate is spent.<sup>2</sup> As if A be tenant

(a) Dyer, 33 a.

(b) 1 Inst. 18, a. 10 Rep. 97, b. Vaugh. 269, contra. Plowd. 235. (*Wilkes v. Lion*, 2 Cowen, 333.)

(c) Bac. Ab. 8vo. Tit. Rem. B.

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† [An estate is *vested* when there is an immediate fixed right of present or future enjoyment. An estate is *vested in possession*, when there exists a right of present enjoyment. An estate is *vested in interest* when there is a present fixed right of future enjoyment. An estate is *contingent*, when a right of enjoyment is to accrue on an event which is dubious and uncertain. Fearne's Introduction.]

<sup>1</sup> The estate devised in this case was a fee simple, vested in the prior and convent; and the payment, required to be made to the dean and chapter, was not deemed a condition, but a conditional limitation in remainder, which being limited after a fee simple already vested, was void. *Higgins v. Dowler*, 1 P. Wms. 98; 1 Salk. 156, S. C.; explained and approved in *Stanley v. Leigh*, 2 P. Wms. 686, 694. And see *Massenburgh v. Ash*, 1 Vern. 234.

<sup>2</sup> It is a rule of law, that a remainder is not to be considered as contingent, when it may be construed, consistently with the grantor's or testator's intention, to be vested; and this, for the sake of greater certainty in titles; because contingent

for years, remainder to B in fee, hereby B's remainder is vested, which nothing can defeat or set aside. So, where an estate is conveyed to A for life, remainder to B in tail, remainder 204\* to C\* in tail, with twenty other remainders over in tail to persons *in esse*, all these remainders are vested.

9. The person entitled to a vested remainder has an immediate fixed right of future enjoyment; that is, an estate *in presenti*, though it is only to take effect in possession and pertainancy of the profits at a future period; and such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession.

10. A remainder is *contingent* when it is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate, in which case, as will be shown hereafter, such remainder never can take effect.

11. There are, according to Mr. Fearne, *four kinds of contingent remainders*:<sup>1</sup>—*First*, Where the remainder depends entirely

remainders, being in the power of the particular tenant, may be destroyed. See 4 Kent, Comm. 203; Doe v. Perryn, 3 T. R. 494, per Buller, J.; Dingley v. Dingley, 5 Mass. 537; Doe v. Prigg, 8 B. & C. 231, per Bayley, J.; Driver v. Frank, 6 Price, 41, per Burrough, J.; Olney v. Hull, 21 Pick. 313.

A testator devised to his sons, for a term of years, the improvement and income of his farm, and after the end of the term, to his grandchildren, the sons and daughters of his sons, in fee. It was held a vested remainder in the grandchildren living at the testator's death, subject to open and let in all born afterwards. Ballard v. Ballard, 18 Pick. 41. And see Wager v. Wager, 1 S. & R. 374; Doe v. Provoost, 4 Johns. 61; [Williamson v. Berry, 8 How. U. S. 495; Yeaton v. Roberts, 8 Foster, (N. H.) 459; Wight v. Barry, 7 Cush. 105; McGregor v. Toomer, 2 Strobb. Eq. 51.]

<sup>1</sup> The whole doctrine of remainders is discussed by Sir Wm. Blackstone, in his Commentaries, B. 2, ch. 11, with a degree of ability, clearness, and philosophical elegance, unequalled by any writer on the law of real property. The study of the entire chapter is earnestly commended to the student, as the easiest method of mastering this abstruse title of the law. His statement of the doctrine of contingent remainders is so far preferable to that of Mr. Fearne, and at the same time is so perspicuously compact, that its insertion here, by way of contrast, cannot but be acceptable.

"Contingent or *executory* remainders," he observes, ("whereby no present interest passes,) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect.

"First, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no; but the

on a contingent determination of the preceding estate itself. As, if A makes a feoffment to the use of B till C returns from Rome,

instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his eldest son in tail, and A died without issue born, but leaving his wife *ençienté*, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest. But, to remedy this hardship, it is enacted by statute 10 & 11 Will. 3, c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime; that is, the remainder is allowed to vest in them, while yet in their mother's womb.

"This species of contingent remainders to a person not in being, must however, be limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines. As if an estate be made to A for life, remainder to the heirs of B; now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est hæres viventis*; but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of B, (if there be no such person as B *in esse*,) is void. For here there must two contingencies happen: first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility, that he should not only have a son, but a son of a particular name. A limitation of a remainder to a bastard before it is born, is not good: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the person who is to take it.

"A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect, is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee: here B is a certain person, the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is forever gone; but if A dies first, the remainder to B becomes vested.

"Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for *years*, or any other particular estate, *less* than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void; but if granted to A *for life*, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is

and after such return of C, then to remain over in fee; here the particular estate is limited to determine on the return of C, and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen; therefore the remainder, which depends entirely upon the determination of the preceding estate by it, is contingent. (a)

12. A fine was levied to the use of A and the heirs male of his body, until the said A should do such a thing, and after such a thing done by the said A, to the use of B in tail. A died without issue, and without performing the condition. It was adjudged that the remainder was contingent. (b)

13. The *second* kind of contingent remainder is where some uncertain event, unconnected with and collateral to the determination of the preceding estate, is by the nature of the limitation to precede the remainder.

14. Thus, Lord Coke says, if a lease for life be made to A, B, and C, and if B survive C, then the remainder to B and his heirs. Here the want of B's surviving C does not affect the determination of the particular estate; nevertheless it must precede and give effect to B's remainder; but as such an event is dubious, the remainder is contingent. (c)

15. Thomas Lane devised his messuage, &c., unto and to the use of his brother George Lane and his assigns, for and  
205 \* during \*the term of his natural life, without impeachment  
\* of waste; and from and after his death, then to the use of Catherine Benger, her heirs and assigns forever, in case she, the said Catherine Benger, should survive and outlive his said brother, but not otherwise; and in case the said Catherine Benger should die in the lifetime of his said brother, then he devised the said messuage, &c., to the use of his brother, George Lane, his heirs and assigns forever. It was held that this was a contingent remainder in Catherine Benger. (d)

(a) Fearn, Cont. Rem. 5. 8th edit.

(b) Arton v. Hare, Poph. 97. Large's case, 3 Leon. 182.

(c) 1 Inst. 378, a.

(d) Doe v. Scudamore, 2 Bos. & Pul. 289.

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void." 2 Bl. Comm. 169—171. See also 4 Kent, Comm. 208, note (a). Blackstone has followed the classification of Ld. Ch. Justice Willes, in *Parkhurst v. Smith*, Willes, R. 327, 338; 3 Atk. 135, 139, S. C. *Post*, p. 214.

[It is the uncertainty of the right which renders a remainder contingent, and not the uncertainty of the actual enjoyment. *Williamson v. Field*, 2 Sandf. Ch. R. 533.]



16. In the contingent remainders which fall under this head, the event which makes them contingent, does not in any way depend on the manner in which the particular estate determines; as, whether it determines in one manner or another, the remainder takes place equally. This distinguishes them from the first sort.

17. The *third* kind of contingent remainder is, where it is limited to take effect upon an event which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate. For it is a rule of law, which will be discussed in a subsequent chapter, that a remainder must vest, either during the continuance of the particular estate, or at the very instant of its determination. So that if the event does not happen during the continuance of the particular estate, the remainder becomes void.

18. Thus, Lord Coke says, if a lease be made to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder is contingent; for though J. D. must die some time or other, yet he may survive J. S., by whose death the particular estate will determine, and the remainder become void. (a)

19. The *fourth* sort of contingent remainder is, where it is limited to a person not ascertained, or not in being at the time when such limitation is made.

20. Thus, if a lease be made to one for life, remainder to the right heirs of J. S.; now, there can be no such person as the right heir of J. S. till his death, for *nemo est hæres viventis*; and J. S. may not die till after the determination of the particular estate; therefore, such remainder is contingent. (b)

21. So where an estate is limited to two persons during their \*joint lives, remainder to the survivor of them in fee, \*206 such remainder is contingent, because it is uncertain which of them will survive. (c)<sup>1</sup>

(a) Boraston's case, 3 Rep. 20, a. (b) 4 Inst. 378, a. 3 Rep. 10, a. (c) Cro. Car. 102.

<sup>1</sup> A testator gave to his wife the use and improvement of his lands while she should remain his widow; and in case of her death or marriage, the land *then* to be divided among his *surviving* sons: It was held, that the devise over was to such of his sons as should be survivors at the termination of the wife's estate for life; and that the remainder was contingent, upon the uncertainty which of the sons would then be living. *Olney v. Hull*, 21 Pick. 311. So, where one devised lands to his daughter H. and her

22. The usual remainder limited in all settlements before marriage, to the first and other sons of the intended husband, by his intended wife, is a contingent remainder.

23. The instances produced of the first kind of contingent remainders may appear to be cases of conditional limitations, not falling strictly within the definition of a remainder; but it will be proved in the next chapter, that they are remainders in the most strict and technical sense of the word.

24. There are some cases which fall literally under one or

husband, for their respective lives, and after their deaths, to the heirs of H.; it was held that the remainder was contingent until the death of H., and then vested in the persons who were then her heirs. *Richardson v. Wheatland*, 7 Met. 169.

[So where a testator devised land to his wife during her life, and at her decease to be divided among his children and the heirs of such as may then be deceased, the remainder was held contingent until the death of the wife, and then became vested. *Hunt v. Hall*, 37 Maine, (2 Heath,) 363.

A testatrix devised to T. for life, and, at his death, to his second son on his attaining twenty-one; but in default of there being a second son of T., to the second son of C., on attaining twenty-one. After her death, T. had sons, the second of whom, G., died before he was twenty-one. T. died intestate. *Held* that G. did not take in fee with an executory devise over, but took a contingent remainder; and that the contingency of G.'s becoming twenty-one, not having happened at the death of T., the limitation over failed, and the heir at law was entitled. *Alexander v. Alexander*, 30 Eng. Law & Eq. Rep. 435. See also *Festing v. Allen*, 12 Mee. & W. 279; and *Doe d. Rew v. Lucraft*, 8 Bing. 386. See also *Taylor v. Gould*, 10 Barb. Sup. Ct. 388; *Evers v. Challis*, 2 Eng. Law & Eq. Rep. 215.]

Where an estate is left to parents, for their lives, and then to the use of such children as may be born between them; the remainder ceases to be contingent immediately on the birth of a child; but still might be defeasible and determinable on a subsequent contingency; and, upon the happening of such contingency, might pass, by way of shifting executory use, to other persons in fee; thus mounting a fee upon a fee. *Carver v. Jackson*, 4 Pet. 1, 90.

A devise "to A, and to his male children, lawfully begotten of his body, and their heirs forever, to be equally divided among them and their heirs forever," passes a life-estate to A, with a contingent remainder in fee to his children, he having no child at the time of making the will. *Sisson v. Seabury*, 1 Sumn. 235.

Where lands were devised to A for life, and if he had issue, then to him, his heirs and assigns forever; but if he had no issue, then to the testator's children in fee; and A suffered a common recovery, and had issue, who died during his life; it was held that the ulterior limitation was a contingent remainder, and not an executory devise, and was barred by the recovery. *Waddell v. Rattew*, 5 Rawle, 231.

Where a contingent remainder is limited to persons, not by name, but by description as a class, and the contingency consists not merely in the uncertainty of the persons who may compose the class when the remainder is to take effect, but in events wholly disconnected with them, and collateral; the estate will vest in the persons answering the description when the contingency happens. *Den v. Crawford*, 3 Halst. 90.

other of the two last kinds of contingent remainders, which are nevertheless classed among vested estates.

25. With respect to those cases which are *exceptions to the third* kind of contingent remainders, it has been held that a *limitation to A for eighty or ninety years, if he shall so long live*, with a *remainder over after the death of A* to B in fee, is *not a contingent remainder*; for the mere possibility that a life in being may endure for eighty or ninety years after such a limitation is made, does not amount to a degree of uncertainty sufficient to render a remainder contingent.<sup>1</sup>

26. Lord Derby covenanted to stand seised to the use of himself for life, remainder to another person for eighty-nine years, if Ferdinando, his son, should so long live; remainder after the death of Ferdinando to his second son in tail. Adjudged that the remainder vested presently, and that the possibility of Ferdinando's outliving the term of eighty-nine years would not make it contingent. (a)

27. A made a feoffment in fee to the use of himself for life, remainder to the feoffees for eighty years, if B and C his wife, should so long live; if C survived B, then to the use of C for life; after her death, to the use of the first son of C and B in tail; for default of such issue, to the use of D and E, and the heirs of their bodies, remainder to the right heirs of A. A died, and C died, leaving a son, who died without issue; thereupon D and E entered, and made a lease to the plaintiff, upon whom the defendant, as son and heir of A, entered.

The question was, whether the remainder in tail to the first son of C and B, and the remainder to D and E were executed, \*or were contingent upon the estate for life to : \*207 C. Adjudged that they were vested and not contingent; that the possibility of B and C outliving the term of eighty-nine years, did not make the remainders to them contingent; and Lord Derby's case was stated and admitted. (b)

(a) Lord Derby's case, Lit. Rep. 370. Pollex. 67.

(b) Napper v. Sanders, Hut. 118.

<sup>1</sup> If the particular tenant is so old, at the creation of the estate, that by the common tables of the probability of duration of life, he will not live out the number of years mentioned, *quare* whether his estate is not to be regarded as a freehold. And see Fearnce on Rem. p. 21—23; *Post*, ch. 3, § 8, 9, 10.

28. This doctrine is further confirmed by Lord Hale, who has laid it down that if a feoffment were made to the use of A for ninety-nine years, if he should so long live, and after his death to the use of B in fee, this should not be contingent, but it should be presumed that his life would not exceed ninety-nine years. (a)

29. If the term of years is so short as to leave a common possibility that the life on which it is determinable may exceed it, the remainder will be deemed contingent; therefore, if an estate is limited to A for twenty-one years, if he shall so long live, and after his death to B in fee, this is a contingent remainder, because there is no improbability in supposing that the life may exceed the term. (b)

30. Sir James Beverly devised lands to his eldest son Thomas for the term of sixty years, if he should so long live; from and after his decease, to his grandson James, the eldest son of Thomas in tail mail; remainder in tail to Thomas his next brother. James the grandson, intermarried with the plaintiff, upon which a settlement was made, and a common recovery suffered by Thomas the father, and James the son.

It was objected that the devise to Thomas, being only of a term of sixty years, if he should so long live; then to James, that the freehold, during the life of Thomas, was in abeyance, and no good tenant could be made to the *præcipe*. By consequence, James the grandson, being dead without issue male, the lands belonged to the defendant Thomas, under the entail.

Mr. Finch argued for the plaintiff that the recovery was well suffered; that the limitation of the entail was good, expectant on the term for sixty years; and that it was so resolved in Lord Derby's case. That the devise to Thomas for sixty years, if he should so long live, and from and immediately after his decease then over, ought to be intended of his dying within the term, which was highly presumable; Thomas being then above forty years old, the possibility that Thomas might overlive the term was very remote; so that there was not any gap or *hiatus* 208 \* in the \* settlement: but by this construction the freehold vested immediately in James; and Thomas had only a term for sixty years, if he should so long live.

(a) Pollex. 67.

(b) 3 Rep. 20, a.

The Court said it would be hard to make such construction on the words of the will, as to say, where a term is limited to a man for sixty years, if he shall so long live, and from and after his decease to A. B, that it must be meant, from and after his decease within the term; for suppose he should outlive the term, should the remainder-man take in the lifetime of Thomas? That were a construction contrary to the words and intention of the testator. (a)

31. In all cases where it is not admitted that there is such a degree of possibility of the life's exceeding the term, as is supposed sufficient to create a contingency in the remainder, there (says Mr. Fearne) the remainder cannot fall within the description of a freehold to commence *in futuro*; for when we suppose the remainder to be vested, we of consequence admit that it passes immediately, subject to and expectant on the preceding term; otherwise it cannot be vested; and then it is a freehold commencing *in presenti* and not *in futuro*. If the life cannot exceed the term, and the term must determine with the life, the limiting an estate to commence from the expiration of the life, is in effect limiting it to commence from the determination of the term. In which latter mode of limitation there could exist no doubt of the remainder's passing immediately and being vested. Upon these principles alone, without recurring to any other, the case put, and distinction taken, by Lord Hale, may be admitted as law. (b)

32. There are three *exceptions to the fourth sort of contingent remainders*. The *first* arises from a rule of law, that wherever the ancestor takes an estate of freehold, and a remainder is thereon limited in the same conveyance to his heirs, or to the heirs of his body, such remainder is immediately executed in the ancestor so taking the freehold, and is not contingent. (c) <sup>1</sup>

33. The *second* exception arises from a rule of law, which has

(a) *Beverley v. Beverley*, 2 Vern. 181.

(b) *Ante*, § 28.

(c) *Shelley's case*, 1 Rep. 104.

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<sup>1</sup> The origin and reasons of this rule, and the cases governed by it, will be found in Vol. IV. tit. 32, ch. 23, and Vol. VI. tit. 38, ch. 14. See also 4 Kent, Comm. p. 216, 217. [The rule in *Shelley's case* is not applicable to a devise of an equitable estate for life to the ancestor, and a legal estate, after the termination of the life-estate, to the heirs. *Ward v. Amory*, 1 Curtis, Ct. Ct. 419.]

been stated in Title XI, Use, That an ultimate limitation to the right heirs of the grantor of an estate is void; and it will  
 209\* continue\* in him as his old reversion, and not as a remainder, though the freehold be expressly limited from him. (a) †

34. The *third* exception arises from the respect which the law pays to the intent of a testator, where it can be plainly collected from his will that he used the word *heir* as a *descriptio personæ*, or sufficient designation of the person for the remainder to vest; notwithstanding the general rule that *nemo est hæres viventis*.‡

35. There is a very material difference between that kind of uncertainty which makes the *estate* in remainder contingent, and an uncertainty of another kind, namely, the uncertainty of a remainder's ever taking effect *in possession*; for wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse*, and ascertained; in that case, notwithstanding the nature and duration of the estate limited in remainder may be such as that it may not endure beyond the particular estate, and may, therefore, never take effect, or vest in possession, yet it is not a contingent, but a vested remainder. As if a lease be to A for life, remainder to B for life or in tail, here, notwithstanding B may possibly die without issue in the lifetime of A, and consequently never come into possession, yet is his remainder vested in interest, and by no means comprised in the legal notion of a contingent estate. (b)

36. It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail, expectant on an estate for life, is and must be liable, as has been observed in the preceding section: The *present capacity of taking effect in possession*, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder deter-

(a) Tit. 11, c. 4, [§ 30, 31, and notes.]

(b) [Fearn, Cont. Rem. 328. *Ives v. Legge*, 3 T. R. 488, note.]

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[† Now altered as regards such limitations in deeds executed after the 31st day of December, 1833. See Stat. 3 & 4 Will. 4, c. 106, § 3.]

[‡ The cases in which this point has occurred will be stated in title 38, Devise, ch. 14.]

mines, universally † distinguishes a vested remainder from one that is contingent. (a)

\* 37. Thus, if there be a lease for life to A, remainder \*210 to B for life, (remainder over in fee;) the remainder to B, although it may possibly never take effect in possession, because B may die before A, yet from the very instant of its limitation it is capable of taking effect in possession, if the possession were to fall by the death of A. It is, therefore, vested in interest; though, perhaps, the interest so vested may determine by B's death, before the possession he waits for may become vacant. (b)

38. On the other hand, if there be a lease for life to A, and after the death of J. D., remainder to B in tail, in that case the remainder to B is not capable of taking effect in possession during the life of J. D., although the possession should fail by the determination of A's estate. But if J. D. chance to die before the determination of the particular estate, then does B's remainder, by such event, become capable of taking effect in possession, when it shall happen to fall, and is then in the same state as if it had been originally limited without any regard to the death of J. D. (c)

39. This very essential alteration in the nature of B's remainder, occasioned by the timely event of J. D.'s death, is the change of a contingent into a vested estate. Before that event, it had not the capacity of vesting in possession; and it was doubtful whether it ever would have it or not; it was, therefore, not vested at all. By that event it acquires the capacity of vesting in possession, when the possession becomes vacant; it is therefore vested in interest, though it is yet uncertain whether it will ever vest in possession; for it is still possible that B may die without issue during the continuance of the particular estate. (d)

(a) (Fearne, Cont. Rem. 328, 329.) (b) Idem. 216, (329.) (c) Idem. (d) Idem. 217.

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[† Mr. Fearne, \* 329, (216,) uses the word "universally;" but it may be questioned whether that expression does not require some qualification; for if A, copyholder for life with remainder to B, and A forfeits his life-estate, B cannot enter for the forfeiture, but the lord only, who will hold during the life of A, so that B's remainder, though vested, has not a present capacity of taking effect in possession, if the particular estate were to determine immediately. 9 Co. 107; Margaret Podger's case; *Wade v. Bache*, 1 Saund. 151; 2 Brownl. 154.]

40. It follows, that whenever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, and ascertained that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, whenever the preceding estate, except in the cases before mentioned as exceptions to the descriptions of a contingent remainder, is limited, so as to determine \*only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse*, or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event independent of the determination of the preceding estate, and duration of the estate limited in remainder to give it a capacity of taking effect; then the remainder is contingent. (a)

41. Where an estate is limited to A for life, remainder to B during the life of A, it is a vested remainder: for here is a preceding estate, to determine on an event which certainly must happen, the death of A; and the remainder is so limited to a person *in esse*, that the preceding estate may, by some means, *viz.*, by forfeiture or surrender, determine before the expiration of the estate limited in remainder, that is, before the expiration of A's life; accordingly, if A's life estate be not expired at the determination of the particular estate, which it will not if A should commit a forfeiture, or make a surrender, then will the remainder take effect in possession. (b)

42. This doctrine was formerly doubted; but it has been resolved in the following case, that a remainder to trustees, during the life of a tenant for 99 years, if he should so long live, to take effect from and after the death of such tenant for life, or other sooner determination of the estate limited to him, was a vested remainder.

43. John Dormer, upon the marriage of his eldest son, conveyed several estates (after a number of preceding limitations for life and in tail) to the use of Robert Dormer for 99 years, if he should so long live; and, from and after the death of the said Robert Dormer, or other sooner determination of the estate lim-



ited to him for 99 years, to the use of trustees and their heirs, during the life of the said Robert Dormer, upon trust to preserve the contingent remainders thereafter limited; and after the end or other sooner determination of the said term, to the use of the first and other sons of the said Robert Dormer, successively in tail male, with remainder over.

One of the questions in this case was, whether the remainder, limited to trustees to preserve contingent remainders, was a vested or a contingent remainder.

The Court of King's Bench determined, that it was a vested, and not a contingent remainder.

Upon a writ of error to the House of Lords, \*the Judges \*213 having been consulted on this case, Lord Chief Justice Willes delivered their unanimous opinion; of which I shall transcribe that part which relates to the present question.

“We deny that this estate, so limited to the trustees, was such a contingent remainder, that it did not vest immediately.

The \*notion of a contingent remainder, is a matter of a \*214 good deal of nicety; and, if I should trouble you with all that is said in the books concerning contingent remainders, and the instances that are put of such contingent remainders, I am afraid it would rather tend to puzzle than enlighten the case. I choose, therefore, to tell your Lordships what are the contingent remainders that do not vest, and what remainders vest immediately, though they are sometimes (though very improperly) called contingent remainders. The definition which was given by the counsel for the appellants of a contingent remainder which does not vest is, where the particular estate may determine before the remainder can take place in possession; and that if it is uncertain when it will take place in possession, and it may happen that it never will take place in possession, the remainder will not vest. But this is not a just definition; for, if this were true, it would overturn all the settlements that ever were made. I will mention but one instance, though I might mention a thousand; as where an estate is limited to A for his life, remainder to another, and the heirs of his body. I believe no man in his senses ever doubted but this was a vested remainder; and yet it is within their definition; for, suppose the remainder-man in tail dies without issue, before the tenant for life, then this remainder will never take place in possession. As, therefore, this is not a proper defi-

nition, we beg leave to acquaint your Lordships what we think is; and we think there are but two sorts of contingent remainders which do not vest. 1st. Where the person to whom the remainder is limited is not *in esse* at the time of the limitation; 2dly. Where the commencement of the remainder depends on some matter collateral to the determination of the particular estate. Many instances of such contingent remainders might be put, which will fall under one of these heads; and I will beg leave to put one of each, the better to illustrate this matter. If the first limitation be to one for life, or for years, and the next limitation to the son of B, who at the time has no children, this is a contingent remainder of the first sort. If there be a limitation to A for life, remainder to B after the death of J. S., or when a third person then at Rome returns from thence, this is a contingent remainder of the second sort. In the first case, if the tenant for life should die, or the term for years expire, before B has a son born, the remainder never vests at all. And 215\* \* in the second case, if B dies before J. S., or before the man returns from Rome, the remainder never vests; because the death of J. S., or the return of the person from Rome, were both conditions precedent. And these are instances, amongst many others, of contingent remainders which do not vest, and of which you may find great variety in Boraston's case, 3 Coke, Rep. 20. But the present limitation to the trustees plainly does not fall under either of these heads. The trustees were persons in being; and their estate was not to commence on any collateral matter, but upon all determinations of the estate of Robert Dormer which could happen during his life; and the estate was limited to them for no longer time. To enforce and illustrate this, I beg leave to mention two or three other things. Will any one say, that any thing can descend to the heir that did not vest in the ancestor; so that, if nothing vested in the trustees, the limitation to them and their heirs is nonsensical; for, according to this notion, if they should die before the contingencies happen, their heirs can take nothing; and yet this word *heirs* has been put in every such limitation for 200 years last past, for it is so long since the Statute of Uses; so that during that time we have been all in the dark, and this new light is but just sprung up, which, if it prevail, for another reason as well as this, will overturn all the settlements for 200 years last past. For in

every one of them, the limitation is either in the same words as the present, or, after the end or other sooner determination of the particular estate, which are words tantamount to this; for end or determination certainly comprehends death, as well as effluxion of time. If, therefore, I could not make this consistent with the rules of law, though I humbly apprehend I plainly have, I should rather choose to put a construction on these words contrary to the rules of law, than overturn many thousand settlements, according to this maxim, founded on the best reason, *communis error facit jus*, and, *ut res magis valeat quam pereat*. But the present case, for the reasons I have already mentioned, is not, I think, liable to this objection. To prove which, I beg leave only to put one case:—A, tenant in fee, grants an estate to B for 99 years, determinable in his life. Supposing B outlive the term, or surrender, or forfeit, no one, I believe, will say but that A may enjoy the estate again. If so, a contingent freehold was in him during the life of B; for it could not be in B, because \* he had only a chattel interest; and it could not be in \*216 any one else;—and if it were in A, it must be a vested interest, for it was never out of him; and if A had a contingent freehold during the life of B, no one can say but that he might grant it over; and if he do, it must be of the same nature it was when it was in A, and consequently, a vested freehold. And this case I have put is expressly held to be law in Co. Lit. 42, *a*, in Cholmeley's case, 2 Co. 51, *a*, and in the year book of Edward III. which is there cited." The judgment was affirmed. (*a*)

44. It frequently happens that *contingent remainders intervene* between the particular estate, and other limitations over; upon which cases, whenever a contingent remainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be vested, if made to a person *in esse*. (*b*)

45. Thus, if an estate be limited\* to A for life, remainder to his first and other sons in tail, remainder to B for life, remainder to his first and other sons in tail; if B has a son born before A, such son will have a vested remainder in him. But if A should

(*a*) Smith d. Dorner v. Parkhurst, 3 Atk. 135. Willes, R. 327. 6 Bro. Parl. Ca. 352. Willes, Rep. 337.

(*b*) Fearne, Cont. Rem. 222.

afterwards have a son, he will take a vested estate precedent to that of B's son. (a) <sup>1</sup>

46. Lands were limited to husband and wife for their lives, and after their decease to their first issue male, and to the heirs male of such issue, and so over to the second, third, and fourth issue male, &c. And for want of such issue, to the heirs male of the body of the said husband and wife. It was held that this last limitation should be executed *sub modo*; that is, in such manner as to open and separate itself from the first estate for life, whenever the contingency happened. (b)

47. The preceding cases are instances where the contingency of the intervening remainders arose from their being limited to persons not *in esse*. But if there be a remainder limited to a person *in esse*, so as to depend on a contingent event, if the same contingency be not considered as extending to the subsequent limitations, such of those limitations as are to persons *in esse* may be vested.

48. Thus, in the case of *Napper v. Sanders*, one of the questions was, whether the remainders, subsequent to the remainder for the life of C, were contingent or vested: it was agreed that C's estate for life was contingent, on the event of her surviving her husband: but still it was held that the subsequent remainders were vested. (c)

49. We have seen that no remainder can be limited after a limitation in fee; but *two or more several contingent estates in fee may be limited, as substitutes or alternatives*, one for the other, and not to interfere; but so that one only can take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect. (d)

50. Sir Michael Armyn devised certain lands to Evers Armyn for life; and, in case he should have any issue male, then to such issue male and his heirs forever; and if he should die without issue male, then he devised the manor of Pickworth to Thomas Style in fee, and the manor of Willoughby to Sir Thomas

(a) *Uvedall v. Uvedall*, 2 Roll. Ab. 119. Tit. 3, c. 2.

(b) *Bowle's case*, 11 Rep. 79.

(c) *Ante*, § 27. *Hut.* 118. *Tracy v. Lethulier*, *infra*.

(d) *Fearne*, Cont. Rem. 373.

<sup>1</sup> The remainder to B's son would not therefore become void; because the limitations were not in fee, but in tail. See *post*, § 63.

Barnardiston in fee. It was determined that the first remainder was a contingent fee to the issue male of Evers Armyn; and the remainder to Sir Thomas Barnardiston was a contingent fee also, not contrary to, but concurrent with the former, according to the notion in *Plunkett v. Holmes*, and was a contingency with a double aspect. For if Evers had had issue male, then the remainder had vested in such issue male in fee; if he died without issue male, that is, (said Treby,) if he never had issue male, then to Sir Thomas Barnardiston in fee. And these were not remainders expectant, the one to take effect after the other, but were contemporary. (a)

51. A person devised all his lands to his son J. L. for the term of his natural life, and, after his decease, unto the heirs male and female of the body of his said son J. L. forever; and if his said son should die, leaving no lawful issue, then he devised the premises to his daughter Elizabeth, and her heirs and assigns forever. After the death of the testator, J. L., the son entered, and suffered a recovery.

The Court was of opinion, that the son acquired an estate in fee simple by the recovery. For if it was an estate tail in him, there could be no doubt; and if he had only an estate for life, with remainder in fee to his heirs male and female, (which the Court rather took it to be,) then this, being a contingent remainder, was destroyed by the common recovery; and all subsequent remainders depending thereon, were also barred, according

\* to the case of *Loddington v. Kyme*, which resembled \*218 this case in all points. (b)

52. A will was made in these words: —“ I give my messuage, &c., to my son J. S. for life, and after his death unto all and every his children equally, and to their heirs; and in case he dies without issue, I give the said premises unto my two daughters and their heirs, equally to be divided between them.” It was determined that both the devises were contingent remainders in fee. (c)

53. A person devised lands to his niece Dorothy for life, remainder to trustees to preserve contingent remainders, remainder

(a) *Loddington v. Kyme*, 1 Ld. Raym. 203. *S. C.* *Barnardiston v. Carter*, 3 Bro. Parl. Ca. 64. 1 Ld. Raym. 208. *Infra*, ch. 6.

(b) *Doe v. Holme*, 2 Black. R. 177.

(c) *Goodright v. Dunham*, 1 Doug. 265.

to all and every the children of Dorothy, begotten or to be begotten by his nephew, J. C., and their heirs forever, to be equally divided among them, but if only one child, then to such only child and his or her heirs forever; and, for default of such issue, to James Comberback for life, remainder to trustees to preserve contingent remainders. Lord Kenyon said, there was nothing to distinguish this case from *Loddington v. Kyme*, and *Goodright and Dunham*. The clear intent of the devisor was, that the children of Dorothy, if any, should take a fee; and if she had no children, then that the remainders over should take effect; but Dorothy had children, by which the limitations over were defeated. (a)

54. Mr. Serjeant Hill, in arguing the above cases, cited a determination of Lord Hardwicke upon a case nearly similar.

A person devised to his wife Elizabeth, and her heirs, all his freehold, leasehold, and personal estate, charged with £200, to be laid out on a house, which he gave to his daughter Marthana, during the term of her natural life; and after her decease, then the same to go and be enjoyed by the children of her body begotten, and their heirs; and, in default thereof, to his son William Legge, his heirs and assigns. William Legge died in the lifetime of Marthana, but devised his interest to the plaintiff; and then Marthana died without children. The question was, whether this devise to William was good, which depended upon what estate he took by his father's will; whether a vested remainder, or a remainder depending upon the contingency or possibility of Marthana's dying without children.

Lord Chancellor. This is a vested remainder in William Legge. Marthana took no more than an estate for life; 219\* for \*when an estate for life is expressly given, no greater estate shall arise by implication; subsequent words of contingency enlarging the estate only, where no express estate for life is devised. Then, as to children, the question is, whether this be a limitation to them in fee or in tail. Had there been no remainder limited over, they would have taken a contingent remainder in fee; but there being a limitation to their uncle, it is impossible they should die without heirs during his or any of his children's life. The doubt arises from the equivocal words,

(a) *Doe v. Perryn*, 3 Term R. 484. *Doe v. Scudamore*, *ante*, § 15.

*in default thereof*; whether they relate to Marthana's<sup>3</sup> dying without children, or to the children's dying without heirs. If to the first, the case will then amount to that of *Loddington v. Kyme*, and make this a fee with a double aspect; or, as it is called in that case, two concurrent contingencies, of which either is to start, according as it happens, being remainders contemporary, and not expectant one after another. But then both will be contingent, as well that to the children of Marthana, as that to William; which is a construction never made without an absolute necessity, as there was in *Loddington v. Kyme*, where the words were, "to E. Armyn for life; and in case he have any issue male, then to such issue male and his heirs forever; and if he die without issue male, then over." And which was a very singular case. And here is no such necessity; the words, *in default thereof*, taking in both the contingencies, as well that of Marthana's dying without children, as of her children dying without heirs; which brings it to no more than the common ordinary limitations in settlements, which take in all the contingencies that can happen. And, as the Court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the inheritance in abeyance; so, neither does it construe a remainder to be contingent, where it can be taken for vested, because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by fine or feoffment, which would have been the case here, by this forced construction of the defendant; since, by taking this for a contingent remainder in William, it would have been in Marthana's power to destroy the whole before the birth of a child. (a)

55. Mr. Fearne observes, that in this last case the word *thereof*, upon which the construction turned, was equally applicable \* to the heirs of the children, as to the children \* 220 themselves; and the heirs, being the last antecedent, there was no ground for excluding the reference to them; which reduced the case to that of a devise to one and his heirs; and in default of heirs, then to a person who was a collateral heir of the first devisee. (b)

(a) *Ives v. Legge*, cited 3 Term Rep. 488. MSS. Rep.

(b) *Fearne*, Cont. Rem. 376. *Doe v. Reason*, 3 Wils. R. 244.

56. Where there is a *contingent limitation in fee absolute*, no estate limited afterwards can be vested.

57. Thus, in the case of *Lodddington v. Kyme*, it was determined that the remainders to Thomas Style and Sir Thomas Barnardiston were contingent, because the preceding limitation to the issue of Evers Armyn was a contingent fee; and the Court took the distinction, that where the mean estates are for life, or in tail, the last remainder may, if it be to a person *in esse*, vest; but that no remainder after a limitation in fee can be vested. (a)

58. In all cases where the *first contingent remainder is in fee*, or where there are concurrent remainders, if the first remainder *becomes vested*, all the *subsequent remainders* become void; for then they become remainders expectant on the determination of an estate in fee simple, or concurrent remainders.<sup>1</sup>

59. Thus, in a case cited by Mr. Justice Buller, where the devise was to G. Pinnock for life, remainder to her first and other sons in tail general, and for default of such issue male, remainder over; and it was contended at the bar, that the word *male* might be rejected. But the Court said they could not do it; but held that the remainder over was a contingent devise, only on the event of there never being a son; and if there were a son ever born, though he died, the remainder over was void. In that case a son was born, who died during the life of G. Pinnock, on the birth of whom the estate vested in him, and the limitation over was void. (b)

60. It seems, however, that a *contingent determinable fee*, devised *in trust* for some special purpose, will *not prevent a subsequent limitation* to a person *in esse* from being vested.

61. Sir W. Dodwell devised all his estates to his daughter for life, remainder to trustees, to preserve, &c., remainder to her first and other sons in tail. In case his said daughter should die without issue of her body living at her decease, then he devised his estates to trustees and their heirs, until his cousin, Sir H.

(a) *Ante*, § 50. 1 Ld. Raym. 208.

(b) *Keene v. Dickson*, 3 Term R. 495. 1 Bos. & Pul. 254, note.

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<sup>1</sup> Where two or more contingent estates in fee are limited, after an estate for life, the rule seems to be, that where *both* limitations are to take effect, the latter can do so only as an executory devise; but where both are limited alternately, on the same event, by the happening of which one is to vest, in exclusion of the other, then both are contingent remainders. *Dunwoodie v. Read*, 3 S. & R. 452, per Gibson, J.



Nelthorpe, should attain his age of twenty-one years; to whom he devised all his estates, after he attained his age of twenty-one years, for life, remainder \*to his first and other \*221 sons in tail male; in default of such issue, or in case the said Sir H. N. should happen to die before he attained his age of twenty-one years, and without issue, then to S. Lethulier for life, &c.

Lord Hardwicke held, that the contingency of the daughter's dying without issue living at her death, affected only the estate limited to trustees, until Sir H. N. should attain twenty-one; that this limitation to trustees was not an absolute fee, as was contended, but a determinable fee; that the estate limited to Sir H. N. was only contingent until he attained twenty-one; that this contingency extended to none of the subsequent estates, and therefore the remainders over to persons *in esse* were vested. (a)

62. It frequently happens that estates are subject to a *power of appointment in the first taker*, with remainders over in default of such appointment. And it is now settled that such a power *does not suspend* the effect of the subsequent limitations, or keep them in contingency. (b)

63. As to the *cases wherein a condition annexed* to a preceding estate is, or is not, considered as a *condition precedent*, to give effect to the ulterior limitations, such cases may be distinguished into *three classes*: 1. Limitations after a preceding estate which is made to depend on a contingency that never takes effect. 2. Limitations over upon a conditional contingent determination of a preceding estate, where such preceding estate never takes effect at all. 3. Limitations over upon the determination of a preceding estate by a contingency which, though such preceding estate takes effect, never happens. (c)

64. I. The cases of *Napper v. Sanders*, and *Tracy v. Lethulier*, (d) appear to fall under the first class in this distribution; in which it was held that the contingency affected only that estate to which it was first annexed, without extending to the ulterior limitations.

65. In a case referred by the Court of Chancery to the Court of King's Bench, the facts were:—T. Hey devised all his real

(a) *Tracy v. Lethulier*, 3 Atk. 774. Amb. 204. Ld. Ken. R. 256.

(b) See post, tit. 32, c. 13.

(c) *Fearne*, Cont. Rem. 233.

(d) *Ante*, § 27 & 61.

estates to trustees, to the use of his son Thomas for life, remainder to the first and other sons of Thomas by any future wife in tail male, remainder to the daughter and daughters of such future wife and their heirs, as tenants in common; provided, that if his son should marry any woman related to his then wife; all  
 222\* and every the \* above uses, so far as the same related to the issue of such future marriage, should cease and be void; and the said trustees should stand seised of all the premises to the use of the children of his brother John Hey and their heirs, as tenants in common. Soon after the death of the testator, Thomas Hey, the son, died without issue, and without having married again, leaving Thomas Farrin Hey his heir at law. The question for the opinion of the Court was, whether the children of John Hey, the brother of the testator, had taken any and what estate in the case that had happened.

The Court certified their opinion that the children of John Hey, the testator's brother, took estates tail under this devise. The Court must, therefore, have thought that the contingency of the son's marrying again, &c., was confined to the estates limited to his future issue. (a)

66. In another case referred by the Court of Chancery to the Court of King's Bench, the facts were:—Edward Bushby, reciting that he was desirous to provide for his sisters, but considering that his sister M. S. was already well provided for during the life of her husband, devised all his estates in the city of Oxford, &c., to trustees, in trust that they should, during the life of M. S., pay the rents and profits to the testator's sisters, E. B. and M. B., their heirs and assigns; and from and after the decease of the husband of M. S., in case M. S. should be then living, in trust, as to one third part, to the use of the said M. S. for her life; and as to another third part, to his sister E. B. for life; and as to the remaining third part, to his sister M. B. for life; with several remainders to their first and other sons in tail male, remainder to their daughters as tenants in common, with cross remainders between their sisters; remainder over to J. S. Horton in tail, with several remainders over. The testator's sister, M. S., died in the lifetime of her husband; and the principal question was, whether the condition of M. S.'s surviving her

(a) *Bradford v. Foley*, 1 Dougl. 53.

husband, was merely confined to the life-estate, or was to extend to all the subsequent limitations.

The Court certified their opinion that the remainder to J. S. Horton was good. They, therefore, must have held, that the condition of the married sister's surviving her husband, did not extend to any of the limitations subsequent to her estate for life. (a)

\* 67. The construction in these cases, as to the restric- \* 223  
tion of the contingency to the estate first hinged upon it, appears to depend on the testator's apparent intention not to extend it further; for wherever there is no apparent distinction in view, in this respect, between such estate and those that follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations. (b)

68. Thomas Hooker devised lands to his son William, and the heirs of his body; and if his said son should die without issue of his body, and the testator's wife, Alice, should survive his son, then that she should enjoy the premises for her life; after her decease they should be enjoyed by the testator's sister, Mary Stratton, for her life; after her decease, (the testator's son William being dead without issue, as aforesaid,) then the testator devised the premises to the lessor of the plaintiff. The testator's wife did not survive his son, but died before him.

Upon a question whether the ulterior devise over had not failed by the wife's death in the son's lifetime, a case was made by consent, for the determination of the Judge (Reynolds) who tried it, whose opinion was, that the remainder limited by the will was contingent, depending on the death of the son without issue in the lifetime of the testator's wife; and as that contingency never happened, the remainder which depended thereon, could never arise. The Judge appears to have laid much stress on the words—"The testator's son being then dead without issue as aforesaid," annexed to the remainder after the wife's decease, as equivalent to a repetition of the contingency first expressed, of the son's dying without issue, the wife then living. (c)

69. Lands were devised to trustees, upon trust, out of the

(a) *Horton v. Whitaker*, 1 Term R. 346.

(b) *Fearne*, Cont. Rem. 235.

(c) *Davis v. Norton*, 2 P. Wms. 390.

rents to pay £20 annually to the testator's daughter for life; to pay the residue of the rents, and the whole, after her decease, to her husband for his life. If he should happen to survive her husband, then to stand seised of all the lands, upon the trusts after mentioned, *viz.* to his said daughter for life, then to her son H. and the heirs of his body, remainder to the heirs of the body of her husband by her; remainder to the heirs of her body by any other husband; remainder to her husband and his heirs forever. The testator's daughter died in the lifetime of her husband.

It was held that the limitations over should not take 224\* effect; for \*that the contingency was not confined to her life-estate, but extended to all the subsequent limitations; the Court not finding upon the whole will sufficient to gather a different intent, so as to warrant them in supplying the omitted words. (a)

70. Mr. Fearne observes, that in this case the contingency itself was expressly, by the words of the will, extended to, and equally connected with, all the subsequent limitations; for the trustees were, in that event, to stand seised of the lands to the several uses, intents, and purposes, in the will after mentioned; which uses included as well the limitations to the wife for life, as those following it; so that there was no particular connection of the condition with her estate more than with any of the rest. (b)

71. II. With respect to limitations over upon a conditional determination of a preceding estate, where such preceding estate never takes effect at all.—The first case was upon a devise to trustees for eleven years, remainder to the first and other sons of A successively in tail male, provided they should take the testator's surname. In case they or their heirs should refuse to take the testator's surname, or die without issue, then he devised his land to the first son of B in tail male, provided he took his surname; if he refused, or died without issue, then to the right heirs of the devisor. A died without having had any son; B had a son at the time of the devise.

The Court did not agree as to the validity of the devise to the first son, after a term of years, without any preceding freehold to support it; but resolved that the subsequent limitation to the

(a) *Doe v. Shippard*, 1 Doug. 75.

(b) Fearne, Cont. Rem. p. 236. ¶

first son of B, who was then *in esse* and capable, took effect; that the preceding limitation to the first son of A, or the condition thereto annexed, did not operate as a precedent condition, which *must* happen, to give effect to the subsequent limitation to the son of B, but was only a precedent estate, attended with such a limitation. (a)

72. Lord Hardwicke was of the same opinion; and has said,—“I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before, by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place.” (b)

73. As most of the cases which occur on this point are cases \* where the whole fee was first limited, the further \*225 consideration of them will be postponed to Executory Devises; (c) only observing in this place, that if such a conditional limitation is not defeated by the falling of the preceding estate, in those cases wherein the whole estate is first limited, *a fortiori* it should not be defeated in the cases where the whole fee is not at first limited; but the remainder, though conditional, includes the residue of the estate, not before otherwise disposed of.

74. III. As to cases of the third class, it may be observed, that although where a remainder is limited to take effect on a condition annexed to a preceding estate, and that preceding estate fails, it appears that the remainder shall nevertheless take place; yet where such preceding particular estate takes place, and the condition is not performed, the remainder, it has been held, will not take effect at the expiration of such preceding estate, unless in those cases where the apparent general intention of the testator calls for it. (d)

75. It sometimes happens that a remainder is *limited in words* which seem to import a contingency, although in fact they mean no more than would have been implied without them; or do not amount to a condition precedent, but *only denote the time when* the remainder is to vest in possession. (e)

(a) *Scatterwood v. Edge*, 1 Salk. 229. Cro. Jac. 592.

(c) Tit. 38, c. 17.

(e) *Fearne, Cont. Rem.* 240.

(b) 2 Ves. 422.

(d) *Fearne, Cont. Rem.* 238.

76. T. Boraston devised lands to A and B for eight years, remainder to his executors until such time as Hugh Boraston should accomplish his full age of twenty-one years; and when the said Hugh should come to his age of twenty-one years, then the testator declared his will to be, that he should enjoy the same to him and his heirs forever. Hugh Boraston died under twenty-one. It was contended that the remainder did not vest in him, because he did not live to attain the age of twenty-one; for as he was not to have it until twenty-one, it was contingent on that event; it being uncertain whether he ever would attain that age. But it was resolved that the case was no other in effect than a devise of lands by a person to executors, until his son attained the age of twenty-one years, remainder to his son in fee; and that the adverbs of time *when* and *then* did not make any thing necessary to precede the settling of the remainder, any more than in the common case of a lease for life or years, and after the decease of the lessee, or the end of the term, remainder to another; in which case the remainder vests presently.

226 \* For \* when these adverbs refer to a thing which must of necessity happen, they make no contingency; for it is certain that every man must die, and every term will end; so that these adverbs *when* and *then* are demonstrations of the time when the remainder shall take effect in possession, not when the remainder shall vest. (a)

77. A having two sons, B and C, levied a fine to the use of himself for life, remainder to B his eldest son for life, after to the first son of the body of B and his heirs male, and so to four sons successively in tail; and if it fortune the said fourth son to die without issue male, then to remain to C. A died; B died without issue male, leaving a daughter. Adjudged that the use vested in C, though B had no issue male; and that B's having issue male was no condition precedent. (b)

78. Devise to A for life, then to B in tail, "and if my three daughters or either of them overlive A and B, then they to have it; and after them I give it to J. W." &c. B died, and two of the daughters died, living A. Then A died. The question was, if this was a contingent estate; and if so, whether the contingency were performed by two of the daughters dying in the life-

(a) Boraston's case, 3 Rep. 19. 1 P. Wms. 170.

(b) Holcroft's case, Moo. 486.

time of B. Resolved, that it was not a contingent limitation, but only an expression when the remainder should commence, that is, take effect in possession. (a)

79. Walter Thomas having four children, devised in these words:—"The house wherein John Taylor dwelleth I give to my son John. *Item*, I bequeathe to my daughter Grace that part and interest that I have in the house at Palace Gate. *Item*, I give to my daughter Elizabeth that garden, &c. *Item*, I give to my son William all the houses which I have in St. Martin's Lane. *Item*, my will is, that when either of my forementioned children shall depart out of this life, that then the houses, lands, goods, and whatsoever I have now given them, shall be equally divided betwixt them that are living."

The eldest son died. It was contended that this limitation over to the children then living, was a contingent remainder to the survivors, depending on the particular estates for life to the children; that the eldest son's estate for life in the house devised to him was merged in the fee which descended to him on his father's decease; and consequently the contingent remainder to the survivors in this house was thereby destroyed. On the other hand it was insisted, and so adjudged by the

\* Court, that this was not a contingent, but a vested re- \* 227  
mainder; that every child took a particular estate in his or her house, for life, with a vested remainder to the others, for their lives. (b)

80. A man devised certain lands to his wife, till his son and heir should attain his age of twenty-one years. When his son should attain that age, then to his son and his heirs. The son died at the age of thirteen years. It was held by Lord Harcourt, that the remainder vested presently in the son upon the testator's death, and was not to expect till the contingency of his attaining twenty-one; for in that case it never would have vested. (c)

81. A person devised all his estates to trustees, in trust to lay out the rents and profits in the maintenance and education of the two sons of his sister, during their minorities; and when and as they should respectively attain their ages of twenty-one years,

(a) *Webb v. Hearing*, Cro. Jac. 415.

(b) *Fortescue v. Abbot*, Pollex. 479. T. Jones, 79. Anon. 2 Vent. 365.

(c) *Mansfield v. Dugard*, 1 Ab. Eq. 195.

then to the use and behoof of the said sons of his sister, and their heirs.

Lord Mansfield said the question was, whether the estate vested immediately in the two nephews, upon the death of the testator; or remained in contingency till their respective coming of age. He said he would lay down a rule or two, previous to his giving his particular opinion on the case. 1. Whenever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property. 2. Where an absolute property is given, and a particular interest is given in the mean time; as, until the devisee shall come of age, &c., then to him, &c.; the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainder-man is to take in possession. To this purpose was Boraston's case, where this doctrine was fully laid down and explained. Upon the whole, he held that the nephews took an immediate gift, with a trust to be executed for their benefit, during their minority. (a)

82. M. Lea devised copyhold estates to T. Lea and E. Johnson, their heirs and assigns, to hold to them and their heirs until M. Lea, second son of his nephew Thomas, then an infant, should attain the age of twenty-four years; on condition that he should, out of the rents and profits, keep the buildings in repair. *Item*, he devised to M. Lea, his great nephew, and to his heirs and assigns forever, *when and so soon as* he should attain 228\* his age \* of twenty-four years, the premises in question; and directed the trustees to surrender the premises accordingly. M. Lea attained the age of twenty-one: but died under twenty-four intestate, and without issue. It was contended that the words, *when and so soon* operated as a condition precedent to M. Lea's taking any interest under the devise; and the event of his attaining the age of twenty-four not having happened, the condition was defeated; consequently this heir at law could take nothing; these words having the same meaning as *if M. Lea shall attain the age of twenty-four*. And it was expressly determined to raise a condition precedent in the case of *Brownswords v. Edwards*.

Lord Kenyon observed, that the words in *Brownswords v.*

(a) *Goodtitle v. Whitby*, 1 Burr. 228. 8 Rep. 95, b. *Ante*, § 76.



Edwards, were very different from the present; there it was, *if he should attain the age of twenty-one*. But the words in this case only denoted the time when the beneficial interest was to accrue. He cited Boraston's case, and Goodtitle and Whitby; and concluded that the words in this case could not operate as a condition precedent, but as giving an absolute interest in fee, and denoting the time when the remainder was to take effect in possession; and therefore that the estate descended to the heir at law of M. Lea. (a)

83. There are *some cases* where the *contingency* upon which an estate is limited has been *considered as a condition subsequent*; so that the estate becomes vested immediately, subject to be defeated by the condition, when it happens.

84. John Hammond surrendered the premises in question to the use of himself for life; after his decease to the use of John Hammond the younger, and his heirs and assigns forever, if it should happen that the aforesaid John Hammond the younger, should live until he attained the age of twenty-one years; provided always, and under the condition nevertheless, that if it should happen that the aforesaid J. H. the younger, should die before he attain the age of twenty-one years, then to remain to the use of the surrenderor and his heirs.

It was resolved, that this was a condition subsequent; and that the estate vested immediately in J. H. subject to be divested if he died under the age of twenty-one years. (b)

85. A testator devised all his real estate to E. D. and J. R. for their lives successively; and after the decease of the longer liver of them, to J. D. Bromfield, if he lived to attain the age of twenty-one \* years; but in case he died before he \*229 attained that age, and his brother Charles Bromfield should survive him, in that case he gave his real estate to Charles Bromfield, his brother, if he lived to attain the age of twenty-one years, but not otherwise; but in case both the above-mentioned boys died before either of them attained the age of twenty-one years, then over. E. D. and J. R. died while J. D. Bromfield was under the age of twenty-one years. The cause coming on at the Rolls, his Honor ordered a case to be made for the

(a) Doe v. Lea, 3 Term R. 41. Vide tit. 88, c. 20.

(b) Edwards v. Hammond, from the Record, 1 Bos. & Pul. N. R. 313.

opinion of the Judges of the Common Pleas, upon the question whether Mr. Bromfield, in the events which had happened, took any and what estate or interest in the freehold or copyhold estates of the testator.

The Judges certified that Mr. Bromfield took a vested estate in fee simple in the freehold and copyhold lands, determinable on the event of his dying under twenty-one. The Master of the Rolls decreed in conformity to this certificate. (a) On an appeal to Lord Erskine, the decree was affirmed by him; and afterwards by the House of Lords. (b)

86. A testatrix devised all her freehold estates to her nephew and heir at law, for his life; and on his decease, "to and amongst his children lawfully begotten, equally at the age of twenty-one, and their heirs as tenants in common; but if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one. And in case my said nephew shall die without lawful issue, or such lawful issue shall die before twenty-one," then over. It was held by the Court of King's Bench, and by the House of Lords, that the children of the nephew took a vested remainder. (c) †

(a) *Bromfield v. Crowther*, Idem. *Doe v. Moore*, 14 East, 601. *Vide* tit. 38, c. 16.

(b) Printed cases, 1811.

(c) *Doe v. Nowell*, 1 M. & S. 327. *Randoll v. Doe*, 5 Dow, 202.

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† [A remainder will not be construed to be contingent, where it can be deemed vested. *Doe v. Perryn*, 3 T. R. 494; *Driver v. Frank*, 3 M. & S. 25; 6 Price, 41. And a vested remainder will not be divested, unless there be a special provision, or a clear intention to be collected from the language of the instrument. *Driver v. Frank*, *supra*. Note to former edition.] [*Johnson v. Valentine*, 4 Sandf. Sup. Ct. 36; *Den v. Demarest*, 1 New Jersey, 525.]

## CHAP. II.

## EVENT UPON WHICH A CONTINGENT REMAINDER MAY BE LIMITED.

SECT. 1. <i>It must be a Legal Act.</i>	SECT. 16. <i>It must not operate to abridge the particular Estate.</i>
4. <i>And Potentia Propinqua.</i>	29. <i>Conditional Limitations.</i>
9. <i>Not repugnant to any Rule of Law.</i>	35. <i>Estates may be enlarged on Condition.</i>
10. <i>Nor contrariant to itself.</i>	

SECTION 1. The uncertainty of the event on which a remainder is limited, is in some cases the circumstance which makes it contingent. But a limitation, intended as a contingent remainder, may fail of taking effect on account of the following circumstances respecting the contingency upon which it is limited to take effect.

2. *First*, the *contingent event* must be a *legal*, and not an illegal act; for Lord Coke says:—"The law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law; for it is *potentia remotissima et vana*, which, by intendment of law, *nunquam venit in actum*." (a)

3. Hence it has been determined, that a *limitation to a bastard (not yet in esse)* is void. Thus, where a man made a feoffment to the use of himself for life, remainder to the use of such issue of the body of Margaret Lloyd as should by common supposition be adjudged to be begotten by the feoffor, whether legitimate or illegitimate. Resolved, that the remainder was void, because the law doth not favor such a generation. (b)

4. *Secondly*, the possibility upon which a remainder is to depend must be a *common possibility*, or *potentia propinqua*; as death, or death without issue, or coverture; for *potentia est duplex, remota et propinqua*. Hence it has been determined, that a remainder to a *corporation, which is not in being* at the time of the limitation, is void, although such be erected after,

(a) 3 Rep. 51, b.

(b)-Blodwell v. Edwards, Cro. Eliz. 509.

during the particular estate ; for at the time of the limitation it was *potentia remota*. (a) <sup>1</sup>

231 \* 5. \* It is different if during the vacation of the mayoralty of D. a lease for life be made, remainder to the mayor and commonalty of D. The remainder is good, if there be a mayor of D. elected during the estate for life. (b)

6. It is laid down in Cholmley's case, that if a lease be made for life, remainder to the right heirs of J. S., this is good ; for by common possibility, J. S. may die during the life of the tenant for life. But if at the time of the limitation of the remainder there be no such person as J. S., but during the life of the tenant for life J. S. be born and die, his heir shall at no time take, because the possibility on which the remainder is to take effect is too remote ; for it amounts to the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it ; viz. first, that such a person as J. S. should be born, which is very uncertain ; and secondly, that he should also die during the particular estate, which is another uncertainty grafted upon the former. This is called a possibility upon a possibility, which, Lord Coke says, is never admitted by intendment of law. (c)

7. Upon the same ground, says Mr. Fearne, arises the distinction between a remainder limited by a general description, and one limited by a particular name to a person not *in esse*. In the first case the remainder is good, as a limitation to the right heirs of J. D. who is alive ; or *primogenito filio* of B. who has no son then born ; but in the other case the remainder is void ; as if it be limited to G., son of D. ; in that case, if D. hath not a son named G. at the time of the limitation, the law will not expect he should afterwards have a son so named ; because it amounts to a possibility upon a possibility ; viz. first, that he should have a son ; and, secondly, that such son should be named G. (d)

(a) 1 Inst. 25, b. 184, a. 2 Rep. 51; a.

(b) 1 Inst. 264, a.

(c) 2 Rep. 51, b. Fearne, Cont. Rem. 251. 1 Inst. 25, b. 184, a.

(d) Fearne, Cont. Rem. 252.

<sup>1</sup> In *New York*, it is provided by statute, that no future estate, otherwise valid, shall be void, on the ground of the probability or improbability of the contingency on which it is limited to take effect. *N. York, Rev. St. Vol. II. p. 11, § 26, 3d. ed.* So, in *Indiana*, *Rev. St. 1843, c. 28, § 62, p. 425.* \*

8. A case is cited from the year book 10 Edw. III. in Cholmley's case, where, upon a fine levied to R., he granted and rendered the tenements to one J. and Florence his wife, for their lives, remainder to G. son of J. in tail, remainder to the right heirs of J.; and in truth at the time of the fine levied, J. had not any son named G., but afterwards he had a son named G., and died. In a præcipe against Florence, it was adjudged that G. should not take the remainder in tail, because he was not born at the \*time of the fine levied, but long after; wherefore \*232 another, who was right heir to J., by judgment of the Court, was received. (a)

This determination was founded on the principle that the law would not expect that J. and F. should have a son so named; because it amounted to a possibility upon a possibility; first, that he should have a son; and, secondly, that such son should be named G.

9. It has been held that a condition or limitation must determine or *avoid the whole* of the estate to which it is annexed; and not determine it in part only, and leave it good for the residue. Upon this principle it has been adjudged, that a proviso to make the estate of a tenant in tail cease during his life, was void. For although the whole estate may be determined by a condition, yet part of it only, viz. during the life of the tenant in tail, shall not; in which case the proviso is ineffectual, on account of its *repugnancy to a rule of law.* (b)

10. A condition may also be *contrariant in itself*; as in the case of a proviso for determining an estate tail, as if tenant in tail were dead. This had been held a contrariant proviso, and *void* on that account; because the death of a tenant in tail does not determine the estate tail, but his death without issue; consequently, to say that the estate shall determine as if he were dead, amounts to saying that it shall determine as it would do upon an event, viz., the death of the tenant in tail, which event might not determine it; therefore such a proviso is contradictory, and absurd in itself.

11. Thomas Cary devised to Peter Cary and the heirs male of his body, remainder in the same manner to his other sons; with a proviso, that if the said Peter Cary, or any of his other sons, or any of the heirs male of their bodies, should attempt or

(a) 2 Rep. 51, b.

(b) 6 Rep. 40, b. 4 Burr. R. 1941.

endeavor to sell, bargain, discontinue, &c., the estate of such person so attempting should cease and determine, as if such person were naturally dead.

It was held, that this proviso was void, being *against law, repugnant, and contradictory*. Against law, because the whole estate ought to be defeated; repugnant, because an estate tail cannot be made to cease as if the tenant in tail was dead; for the death of a tenant in tail does not determine an estate tail, but his death without issue. (a)

233 \* \* 12. Sir R. Cholmley, by a conveyance to uses, limited his estate to the use of F. Cholmley for life, remainder to the use of H. Cholmley and the heirs male of his body, remainder over; with a proviso, that if the said Henry or any of the heirs male of his body, should attempt or make any feoffment, his estate should cease as if he were dead. The proviso was held to be illegal and void. (b)

13. S. Corbet covenanted to stand seised to the use of himself for life, remainder to his eldest son Rowland and the heirs of his body; with a proviso, that if the said Rowland, or any of the heirs male of his body, should be resolved and determined, or advisedly should attempt or procure any act or thing concerning any alienation of the said premises, by which any estate tail thereof should be barred, that the estate to him limited should cease, only in respect to such person so attempting to alien, in the same manner as if such person was naturally dead. After the death of S. Corbet, his son Rowland entered, and suffered a common recovery; and the person in remainder having entered, on the breach of the proviso, it was determined that the proviso was repugnant, impossible, and against law; for the death of a tenant in tail is not a determination of the estate tail, but his death without issue. (c)

14. So, where a proviso similar to that in the last case was inserted in a deed, "it was resolved that it was impossible and repugnant that an estate tail should cease as if the tenant in tail was dead, (had he, issue or not,) for an estate tail cannot cease so long as successive heirs continue. But here his intent was to continue the estate tail, and to cease it in respect of the party offending only, and not as to any other, which was impos-

(a) *Jérmin v. Arscot*, 1 Rep. 85, a. (*Hawley v. Northampton*, 8 Mass. R. 3.)

(b) *Cholmley v. Humble*, 1 Rep. 86, a.

(c) *Corbet's Case*, 1 Rep. 83, b.

sible, repugnant, and against law; for every limitation or condition ought to defeat the whole estate, and not to defeat part of the estate, and leave part not defeated; and it could not make an estate to cease *quoad unam personam*, and not *quoad alteram*. (a)

15. So, where a person devised his estate to H. K., and the heirs male of his body, until such time as the said H. K., or any issue male of his body, should effectually and expressly assent, conclude, do, or go about to do, or make any act or acts to alter, discontinue, or change his estate tail. H. K. joined with his son in levying a fine of the estate. \*The Court re- \*234 solved, "That this was a perpetuity in our law books, and repugnant to the law, and not allowable; for he may not determine an estate tail by such a limitation. Nor can he give title to another to enter, who is a stranger; for, by the fine, there was a discontinuance of the remainder, and a divesting thereof, so as he could not enter; for it was no limitation to enter, but after the effectual going about, and it was not effectual until the act was done; and when the act was done, the remainder was discontinued, and then he could not enter. Also, they held these were uncertain, ambiguous, and inadequate words, to make the limitation of an inheritance by the determination thereof, and, therefore, void and repugnant to law, and the law would never give allowance to it; wherefore they held that the case was all one with the reasons in the cases of Sir A. Mildmay, Corbet, &c." (b)

16. The event or contingency on which a remainder is limited *must not operate so as to abridge, defeat, or determine the particular estate*.<sup>1</sup> This rule follows of necessity, from the nature of a remainder, as exhibited in the definition of it by Lord Coke; so that it is of the essence of a remainder that it should wait for, and only take effect in possession, on the natural expiration or determination of the first estate.

17. This rule also follows as a consequence of the rule already stated, (c) that no one shall take advantage of a condition but the

(a) Mildmay's case, 6 Rep. 40. *Vide* tit. 13, c. 1.

(b) Foy v. Hinde, Cro. Jac. 697. *Vide* Fearn, Cont. Rem. 256. (c) *Vide* tit. 13, c. 2.

<sup>1</sup> In *New York*, this rule is abolished, and the contrary thereof is enacted by statute, which provides that a remainder, so limited, shall be construed a conditional limitation. Rev. St. Vol. II. p. 11, § 27. So, in *Indiana*, Rev. St. 1843, ch. 28, § 61, p. 425.

party from whom the condition moves, that is, the grantor and his heirs; for if he or his heirs take advantage of a condition, by entry or claim, the livery made upon the creation of the estate is defeated, and of course every estate then created is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate, and remainders are defeated by the entry of the grantor; therefore such remainder is void. It follows that a remainder properly so called, cannot be limited to take effect upon a condition, which is to defeat the particular estate; whether such condition be repugnant to the nature of the estate to which it is annexed, or not.

18. If, therefore, a lease for life be made, upon condition that if a stranger pay to the lessor £20, then *immediately* the land shall remain to the same stranger; this remainder is void, for the tenant for life ought to have it during his life; and if so, during that time the stranger cannot have it, for he can take no  
235\* advantage \* of the condition, but only the grantor or his heirs. Had it been limited that, if a stranger pay to the lessor £20, then, *after the death of the tenant for life*, it should remain to that stranger, it would have been a good remainder. (a)

19. The distinction between the two cases is this:—In the latter, the remainder is not to vest in possession till after the determination of the estate for life, when it may vest of course. In the former, it is limited to take effect in possession on the performance of a condition, which is to defeat the estate for life; and not to wait till the particular estate be determined, by means consistent with the nature of its original determination.

20. If a lease be made to two, the remainder over to a stranger in fee, after the death of the first of them, this remainder is void; because, as the survivor must have the lands for life, by the nature of the first estate, the limitation over after the death of the first of them, cannot take place without defeating the first estate, as to the interest of the survivor. (b) <sup>1</sup>

21. Upon the same principle it seems that, if an estate be granted to A, a widow for life, remainder to B in fee, on condition that A continues a widow; if A marries, the entry of the

(a) Plowd. 29. 2 Leon. 16.

(b) Plowd. 24.

<sup>1</sup> But if the limitation over had been to the survivor, it would have been good. See *post*, § 27.



heir will defeat the estate to A, and also the remainder to B. But that, if an estate had been granted to A *durante viduitate*, remainder to B upon A's marriage, her estate would determine by the nature of its limitation, and the remainder to B would take effect. (a) <sup>1</sup>

22. Here, however, we are to observe that, if land be leased to one for life, &c., and if such a thing happen, then to remain to B, &c. This shall not be understood as intended to vest in possession immediately upon the happening of the condition, and in abridgment of the preceding estate; because, under that construction, the remainder would be void, for the reasons already given; but it shall be construed to vest in *interest*, upon the happening of the condition, and to remain as a remainder ought to do, that is, so as to await the determination of the preceding estate, before it comes into possession. (b)

23. Thus, where lands were limited to husband and wife for their lives, remainder to A, their son, for life, if he should die in the lifetime of the husband and wife, that then the lands should remain to B, another of their sons, for life. It was resolved that the remainder limited to B was good; and that the words, \* "If A should die in the lifetime of the husband and \* 236 wife, then the lands should remain to B," did not operate to defeat the estate limited to the husband and wife, but only indicated the time when the remainder should become vested in interest. (c)

24. The same law holds with regard to a subsequent remainder, limited to take effect on a condition which is to defeat a preceding remainder.

25. A being seised in fee, leased to B for life, remainder to C for life; provided, that if A should have a son, who should live to the age of five years, the estate limited to C should cease, and the land remain to that son in tail. It was determined that the estate limited to the son was void, because it depended on a condition which operated to defeat the preceding remainder. (d)

(a) *Sayer v. Hardy*, Cro. Eliz. 414. *Fearne*, Cont. Rem. 282. (b) *Ante*, c. 1.

(c) *Colthirst v. Bejushin*, Plowd. 23. (d) *Cogan v. Cogan*, Cro. Eliz. 360.

<sup>1</sup> This case is better reported in Poph. 99, nom. *Sawyer v. Hardy*. The lease was to a widow for forty years, on condition that if she continued sole, she should dwell in the house; and the question arose between her executor and the remainder-man, she dying within the forty years.

26. It may happen that, notwithstanding a contingent limitation is *expressed* to commence from a period eventually anterior to the determination of the particular estate, yet the nature of the case may be such as not to admit of its taking effect in possession, in restraint, abridgment, or exclusion, of the particular estate. As if such limitation over were to the grantee or devisee of the particular estate; which, instead of operating in any degree to defeat, exclude, or curtail the particular estate, would, in effect, remove its limits, and expand it into a greater estate. This is but in conformity to what was allowable at common law in regard to the enlargement of estates on condition; which limitations so far resemble contingent remainders as to require the continuance of the particular estate till they are vested. And although the limitation should not so far approach the particular estate in *quality*, as to come within the doctrine of estates to be enlarged on condition, yet if it be such as cannot defeat, exclude or abridge the particular estate, nor have any other operation than if the words *expressive of its time of commencement* had been omitted; or if it had been in express words postponed, *till after* the determination of the preceding estates, the objection to its effect as a *remainder* does not hold; as it then in effect gives no more than the *remnant* or *residue* expectant on the particular estate; and could not have entitled the grantor or his heir to enter at common law, in defeasance of the particular estate; nor operates at all to the prejudice of strangers; which are the reasons assigned against the validity of conditional limitations at common law. (a)

237 \* \* 27. Thus, suppose in the case of a lease to two, as in a former case, the limitation over after the death of the first of them had been to the survivor, instead of a stranger; this would not have avoided, defeated, or abridged, the estate of the survivor, but actually have embraced it in the afflux of a greater, into which it would have run, under the technical term of merging, instead of being rescinded or nullified. The grantor or his heir could have no title to enter and defeat the particular estate, because there was no condition or proviso to make it cease, or carry the estate either expressly or implicatively to any body, from the devisee of the particular estate. Nor could the

(a) Fearne, Cont. Rem. 264.

limitation operate to the prejudice of another, viz. the person otherwise entitled to the particular estate, because it was to that very person himself; and the effect would have been precisely the same if the limitation had been, and from and after the determination of the estate aforesaid, to the survivor in fee. Nothing would, therefore, in that case, have prevented the limitation over from operating strictly as a remainder at common law. (a)

28. A person devised to his wife Elizabeth, and his daughter Ann, a certain messuage, &c., to hold unto his said wife and daughter, for and during the term of their natural lives, and the life of the longer liver of them, in equal proportions; and then proceeded in these words:—"But in case my said daughter Ann should happen to marry and have issue of her body lawfully begotten, then and in that case, after the decease of my said wife, I give and devise all the said messuages, &c., unto my said daughter Ann, and to her heirs and assigns forever. But if my said daughter Ann should happen to die single and unmarried, and without issue of her body lawfully begotten, then and in such case I give and devise the said premises unto my said wife Elizabeth, and to her heirs and assigns forever." The testator died in 1774, leaving Elizabeth his widow, and Ann his daughter, who was his heir at law. Elizabeth died in 1775; after her death Ann suffered a recovery of the estate, and devised it to the defendant, and died unmarried. The heir of Elizabeth brought an ejectment against the devisee of Ann.

Lord Mansfield said:—"It is perfectly clear and settled, that where an estate can take effect as a remainder, it shall never be construed to be an executory devise or springing use. Here the first limitation is to two persons and the survivor, so that a preceding \*freehold will be in the survivor; and the \* 238 estate over is limited on a contingency upon which a remainder may depend; it is to the daughter and her heirs (not issue) if she should marry and have issue; and it must have taken effect after the death of the survivor. There is another contingency on the event of the daughter's dying unmarried and without issue, (not on failure of her issue,) and upon that event the remainder is to the widow in fee." It was resolved that the

estate devised to Ann, in case<sup>s</sup> she should marry and have issue, was a contingent remainder. (a)

29. It has been stated in Title XIII. that a condition must avoid or determine the whole estate to which it is annexed; and that the benefit of a condition can only be reserved to the donor and his heirs, not to a stranger. In consequence of this doctrine, *no remainder could be limited on a condition.* 1st. Because such condition would operate so as to abridge the particular estate. 2d. Because the entry of the donor, for the condition broken, would defeat the remainder. (b)

30. It has, however, been long settled, that where, *in a devise, a condition is annexed to a preceding estate*, and upon the breach or non-performance thereof the estate is *devised over* to another, *the condition shall operate as a limitation*, circumscribing the measure and continuance of the first estate; that upon the breach or performance of it, as the case may be, the first estate shall *ipso facto* determine and expire, without entry or claim; that the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have an immediate right to the estate. Thus is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger, and enforcing the performance of the condition by the determination of the preceding estate upon the breach of it, notwithstanding that preceding estate be limited to the heir himself; and limitations of this kind are properly called *conditional limitations.* (c)<sup>1</sup>

31. Thus, where a person devised lands to his mother for life, after her death to his brother in fee; provided that if his wife (being then with child) be delivered of a son, that then the land should remain to the son in fee. After the testator's death, a son was born; held, that the fee of the brother should cease, and the estate vest in the son, upon the happening of the contingency. (d)

239 \* 32. In the case of *Fry v. Porter*, which has been

(a) *Goodtitle v. Billington*, 1 Doug. 753.

(b) 1 Roll. Abr. 472, 474. *Fearne, Cont. Rem.* 272.

(c) *Fearne, Cont. Rem.* 407, 409.

(d) *Dyer*, 33, a. 127, u. *Cro. Jac.* 592.

<sup>1</sup> For the difference between a condition, and a conditional limitation, see *ante*, tit. 13, ch. 2, § 64, note.

already stated, (a) it was held that Lady Ann Knowles had an estate tail till she married without consent; and that the estate tail devised to her was subject to two limitations; the one in law, viz. dying without issue; the other express and in fact, viz. marrying without consent, which was properly a conditional limitation, not a condition; for, if it were a condition, it would descend to the heir at law, who might enter for a breach of it, and defeat the limitation over. It was therefore agreed that the marriage without consent determined her estate tail, and the devise over took place. (b)

33. A person devised lands to A, who was his heir at law, and other lands to B in fee; and that if A molested B by suit or otherwise, he should lose what was devised to him, and it should go to B. After the testator's death, A entered on the lands devised to B, claiming them. It was held that this was a sufficient breach to give title to B, and that the condition imposed on the heir should not be taken as a condition, because if so, by descending on him who alone could enter for the breach of it, it would in this case be fruitless and defeated; but it was held to be a limitation, which determined the heir's estate, and cast the possession on B without entry. (c)

34. Where there is no express limitation over, to take effect upon the breach or non-performance of the condition annexed to the preceding estate, there, it seems, the condition or proviso is not always construed as a conditional limitation. (d)

35. There is a limitation of another kind which may be considered as an *exception* to the rule at common law, that an estate limited to take effect on a condition which is to affect the particular estate is void; namely, those cases where a particular estate is *limited with a condition*, that after the performance of a certain act, or the happening of a certain event, the person to whom the first estate is limited shall *have a larger estate*. For it was resolved, in the case of Lord Stafford, that such a grant may be good, as well of things which lie in grant, as of things which lie in livery; and may be annexed as well to an estate tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater estate. (e)

(a) Tit. 13, c. 1.

(b) *Bertie v. Faulkland*, tit. 13, c. 1.

(c) Anon. 2. Mod. 7.

(d) *Gulliver v. Ashby*, Fearne, Ex. Dev. 424.

(e) Fearne, Cont. Rem. 279. 8 Rep. 47.

240 \* \* 36. But that such increase of an estate by force of such a condition ought to have *four incidents*.

*First.* There ought to be a *particular estate* as a foundation for the increase to take effect upon, which, Lord Coke held, must not be an estate at will, nor revocable, nor contingent.

*Second.* Such particular estate ought to *continue in the lessee or grantee, until the increase happens, without any alteration in privity of estate*, by alienation of the *lessee or grantee*; though the alienation of the lessor or grantor will not at all affect it: and the alteration of persons by descent of the reversion to the heirs of the grantor, or his alienee, or of the particular estate to the representatives of the grantee, shall not avoid the condition. Where the grantee dies before the performance of the condition, his heir shall, after he has performed the condition, be in *quodam modo*, by descent; and such increase need not take place immediately upon the particular estate, but may enure as a mediate remainder, subsequent to an intermediate remainder for life, or in tail to somebody else.

*Third.* The *increase must vest* and take effect *immediately upon the performance of the condition*; for if an estate cannot be enlarged at the very instant of time appointed for enlargement, the enlargement shall never take place; therefore, though the reversion be in the king, it shall instantly be out of him, upon performance of the condition, and vest in the grantee without petition, or *monstrans de droit*, or other circumstance: for the awaiting such circumstances would frustrate and defeat the enlargement, and the law will never require circumstances to subvert the substance.

*Fourth.* The particular estate and the increase ought to take effect by *one and the same instrument* or deed; or by several deeds delivered at one and the same time, which in effect is the same thing, for *quæ incontinenti fiunt, inesse videntur*; because the particular estate and the increase thereupon is only a grant to take effect out of one and the same root; and though the increase vest at a different time, yet, when it is vested, it has its force and effect from the same grant.

## CHAP. III.

## ESTATE NECESSARY TO SUPPORT A CONTINGENT REMAINDER.

SECT. 1. *It must be a Freehold.*11. *Unless the Remainder is for Years.*13. *A Right of Entry to a Freehold is sufficient.*17. *But it must be a present Right.*SECT. 19. *Both Estates must be created by the same Instrument.*24. *Where the legal Estate is in Trustees, there needs no other preceding Estate.*

SECTION 1. It is a general rule, that whenever an estate in contingent remainder amounts to a *freehold*, some *vested estate of freehold* must precede it.<sup>1</sup> This arises from the necessity there is for the freehold to pass out of the grantor at the time the remainder is created; for if no freehold passes, then the remainder-man cannot have it. If it passes at all, it must pass either in the particular estate, or in some remainder, limited after it. In a contingent remainder it cannot pass, because such remainder, at the time of its creation, passes to, or vests in, nobody; and if it passes only in some vested remainder, limited after the contingent remainder, then is such contingent estate precluded from ever rising at all; for that freehold then becomes vested in possession, which the contingent estate was limited to precede, and of course there is no room left for the introduction of the contingent freehold. It follows, therefore, that some preceding vested estate of freehold must be limited to give existence to such contingent remainder. (*a*)

(*a*) Fearn, Cont. Rem. 281.

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<sup>1</sup> In *Virginia*, where an estate is limited in remainder to the child or children of any person, to be begotten, posthumous children may take, notwithstanding no estate has been conveyed to support the contingent remainder after the parent's decease. Tate's Dig. 336. The like provision has been enacted in *Mississippi*; Rev. St. 1840, ch. 34, § 27, p. 349; and in *Kentucky*, Rev. St. Vol. I. p. 443, § 11.

2. A person devised lands to his son John for fifty years, if he should so long live ; and, as for his inheritance after the said term, he devised the same to the heirs male of the body of John. The Court held this devise to the heirs male of the body of John to be void as a remainder, for want of an estate of freehold to support it. (a)

242\* 3. But where an estate was limited to the use of the settlor for ninety-nine years, if he should so long live, remainder to trustees and their heirs during his life, remainder to the use of the heirs of his body, &c. ; it was held, that the contingent remainder to the heirs of the body of the settlor was good, because it was preceded by a vested freehold remainder to the trustees. (b)

4. There is a case reported by Moore, where A covenanted to stand seised to the use of himself for life, remainder to B, his brother's eldest son, for life, remainder to the first and other sons of B in tail, remainder to the right heirs of A. A was afterwards attainted of treason, and executed, before the birth of any son of B ; and it was resolved, that by the attainder of A, the after-born sons of B were barred ; and that the crown had the fee simple, discharged of all the remainders limited to the sons of B not then born. (c)

5. Mr. Fearne has observed that it is extremely difficult to reconcile this resolution with the principle that any preceding vested estate will support a contingent remainder ; for here, whatever effect the forfeiture of A's estate for life and remainder in fee might otherwise have had, yet as B had a vested freehold, why was not that capable of supporting the contingent remainders to his sons ? There were no reasons given for the resolutions in this case ; and perhaps to account for it, we were to recur to the supposed necessity of a seisin in the feoffees, covenantees, &c., to serve contingent uses when they come *in esse* ; which principle admitted, it might be inferred, as it seemed agreed, that the crown could not stand seised to a use, that there could be no seisin after A's forfeiture to the crown, to serve the contingent uses to B's sons, when they came *in esse* ; and that, on that account, they could never take effect. (d)

(a) Goodright v. Cornish, 1 Salk. 226.

(b) Elie v. Osborne, 2 Vern. 754. Doe v. Morgan, *infra*.

(c) Sir T. Palmer's case, Moo. 815.

(d) *Infra*, ch. 5. Tit. 11, c. 3.



6. If there had been an office found, antecedent to the birth, of a son of B, that A was seised in fee, it might have accounted for the resolution in the above case, by taking away the right of entry of B, according to a distinction which will be noticed in a subsequent part of this chapter. And the determination is contradicted by the two following cases.

7. J. S. was tenant for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to the right heirs of J. S. This J. S. committed high treason, and then \* had a son, and afterwards was attainted. The Court held, \* 243 that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the vesting of the estate in the crown, during the life of J. S., because of the wife's estate, which was sufficient to support it. (a)

8. It has been stated, that where there is a limitation to a person for ninety-nine years, if he shall so long live, with a remainder over to a person *in esse*, such remainder is considered as vested. But Mr. Fearne has observed, that in this sort of limitation, when not by will or by way of use, if the term for years is so short as to leave a common possibility that the life on which it is determinable may exceed it, there should be a present vested freehold estate, to prevent the limitation over from being void, as a freehold to commence *in futuro*. (b)

9. In Lord Derby's case, and that of *Napper v. Sanders*, (c) a preceding freehold, being limited to the feoffees, left no room for this objection. But the case put by Lord Hale stands independent of any preceding freehold; and though it seems capable of being supported upon the principle of a preceding freehold arising by implication, yet there seems to be no occasion for such a resort, because the allowed improbability of the life's exceeding the term of years determinable thereon, appears sufficient to take such remainders out of the description of freeholds to commence *in futuro*.

10. It is generally true, says Mr. Fearne, that in the case of a limitation to A for twenty-one years, if he shall so long live, and after his death to B in fee, the remainder to B is void, as being a freehold to commence *in futuro*, viz. after the decease of A, no freehold having been limited, so as to take effect before

(a) *Corbet v. Tichburn*, Salk. 576. (b) Chap. 1, § 25. *Fearne, Cont. Rem.* 23.

(c) *Ante*, c. 1, § 26, 27, 28.

that period, because, in this case, it is very possible that the period limited for the remainder to take effect from, viz. the decease of A, may not happen till after the determination of the preceding estate, viz. the term of years in which event the remainder could not take effect at all, as has been already observed. Its taking effect is, therefore, uncertain, in regard of this impossibility of the preceding estates determining before the event happens, from whence the remainder is to commence: and should it take effect at all, it must be *in futuro*, that is after the event is decided, on which its taking effect depends. Here, then, there

being no preceding freehold limited, the remainder, which  
 244 \* \* must take effect at some future period, if at all, is strictly  
 nothing else than a freehold limited to commence *in futuro*. It is the allowed common possibility of the life's exceeding the term which creates such a contingency in respect to the remainder's taking effect, as brings that remainder within the description of a freehold limited to commence *in futuro*, and consequently within the direct application of the rule which denies any effect to limitations of that kind. (a)

11. As to a *contingent remainder for years*, there does *not* appear to be *any necessity for a preceding freehold* to support it; for the remainder not being freehold, no such estate appears requisite to pass out of the grantor, in order to give effect to a remainder of that sort. (b)

12. Frances, Duchess of Richmond, demised certain lands to John Lord Paulet and others, to hold from thenceforth for forty years, if she lived so long, in trust that she might receive the profits during her life; after her decease, one moiety thereof to Mary Clarke, and the other moiety to Joan Brooke, their executors, administrators, and assigns, for and during the term of one thousand years, from the death of the said Frances. The Court doubted that the remainders were void; because, 1. They could not pass to them by way of present estate, they not being parties to the deed. 2. They could not be contingent remainders, being remainders for years, depending on an estate for years; and there could not be a contingent estate for years, because a lease for years operated by way of contract; therefore the particular estate and the remainder operated as two distinct estates, grounded upon several contracts.

(a) Fearn, Cont. Rem. 23.

(b) Fearn, Cont. Rem. 285.

Mr. Fearne has observed, that this opinion seemed not to be well considered, and that the Court did not appear to rely upon it, when they said, that, admitting the term of one thousand years was a contingent remainder, it was barred by a fine, and a non-claim, after the time of vesting. (a)

13. Although every contingent *freehold remainder* must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant. *It is sufficient* if there subsists a right to such preceding estate, at the time the remainder should vest, provided such right be a *right of entry*, and not a right of action only; for whilst a right of entry remains, there can be no doubt but that the same estate continues, since the right of entry can exist only \*in consequence of the existence of the estate. But \*245 when the right of entry is gone, and nothing but a right of action remains, it then becomes a question of law, whether the same estate continues or not; for the action is nothing more than the means of deciding the question. Another estate is, in the mean time, acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought. (b)

14. If A be tenant for life, with a contingent remainder over, and the tenant for life be disseised, all the estates are divested, but the right of entry of the tenant for life will support the contingent remainders. If, however, in a case of this kind, the contingent remainder does not vest before such a descent of the estate, from the disseisor to his heir, as will take away the entry of the tenant for life, within the statute 32 Hen. VIII. c. 33, and drive him to his action, then is the contingent remainder gone; because there no longer subsists any right of entry to support it, that right being turned into a right of action. (c)<sup>1</sup>

15. It has been already stated, that a tenant in tail might alienate his estate by certain modes of conveyance, so as to take away the entry of the issue in tail, and drive him to his action;

(a) Corbet v. Stone, T. Raym. 140. Fearne, Cont. Rem. 485.

(b) Fearne, Cont. Rem. 486. 1 M'Cl. & Yo. Ex. R. 58, 88. Tit. 29, c. 1.

(c) 1 Rep. 66 b. Fearne, Cont. Rem. 431. Lloyd v. Brooking, *infra*, c. 6. 1 Ld. Raym. 316. Tit. 29, c. 1.

<sup>1</sup> In several of the United States it is expressly enacted that a descent cast shall not take away a right of entry. See *post*, tit. 29, ch. 1, § 7, note.

which was called a discontinuance. From which it followed, that where a contingent remainder was limited after an estate tail, and the tenant in tail created a discontinuance,† the contingent remainder would be destroyed. (a)

16. The following case arose in 11 Rich. II. A gift in tail was made to A. C., the remainder to the right heirs of A. S. The donee made a feoffment to B. in fee, and afterwards A. S. died. His right heir shall never have the remainder; for the estate of the land was, by the feoffment of the tenant in tail, divested and discontinued; and there was not any particular estate *in esse*, or in right, to support the remainder; for by the feoffment of the tenant in tail, his right was utterly gone. If tenant in tail was disseised, and died, that would not destroy the remainder; for there a right to the particular estate remained, to support the right of the remainder; but when the tenant in tail made a feoffment, no right remained in him. (b)

17. The *right of entry* to support a contingent remainder *must be a present right*; a future one will not do. It must also  
246 \* precede \* the contingency, and be actually existing when that happens; for if it only commences at the same instant with it, the remainder, it seems, will not vest; [but a right of action will not support the contingent remainder.] (c)

18. [It has been held that] a right of entry only will not support a contingent remainder limited by way of use, [but that there must be an actual entry; but this doctrine has been questioned.] (d)

19. The estate supporting, and the remainder supported, should *both be created by one and the same deed or instrument*; ‡ there-

(a) Tit. 2, c. 2, § 6.

(b) 1 Rep. 135, b.

(c) Fearne, Cont. Rem. 288. 1 M'Cl. & Yo. 58, 88. (d) *Vide infra*, c. 6, § 28, *et seq.*

† [See Stat. 3 & 4 Will. 4, c. 27, § 39, *supr.* Vol. I. p. 79.]

‡ [And for this purpose a will and codicil are parts of the same assurance; so that a particular estate may be created by a will, and the remainder by a codicil, and *vice versa*. Hayes v. Foord, 2 Sir W. Bl. Rep. 698. So, likewise, it would seem upon principle, that an appointment under a power, and the deed containing the power would, in reference to the rule above stated, be considered as parts of the same assurance; since the limitations created by an exercise of the power are considered as inserted in the deed creating the power. So that if an estate be limited to A for life, remainder to such uses as he should appoint, and he appoint to B in tail, the limitation to B is a valid remainder.]

fore an estate for life given by one deed, will not support a remainder given by another; nor an estate for life settled by A on B by deed, enure to support a contingent remainder given by the will of A. (a)

20. A woman being tenant for life, her husband devised the same estate to the heirs of her body; if they attained fourteen years. The Court held, that this was no remainder, but an executory devise; for though the wife had a preceding estate for life, yet this was a new devise, to take effect after her decease, and was not a remainder joined to a particular estate. (b)

21. A being tenant for life by marriage settlement, remainder to his wife for life, remainder to his first and other sons by that marriage in tail; his father, the reversioner, by his will, after reciting the settlement, devised the lands to the first and other sons of A, according to the settlement; then if A should die without issue of that marriage, he devised to the first and other sons of A by any other wife in tail male; and if A should die *without issue*, then he devised that all the lands should go to his grandchildren by his daughter P. in fee.

It was contended that A took an estate tail under this will by implication, and of course the remainder over in fee was well supported; but the Court held, that it was impossible to make this an \*estate tail in A, for nothing was given to him \*247 by the devise, so that he had only the estate which he took under the first settlement; and that there being two several conveyances, the devise could not be tacked to the estate for life, which was limited by another conveyance; even admitting that the word *issue* could be an implication of an estate to the heirs of the body of A. (c)

22. A person made a feoffment to the use of himself for life, and after the death of A, and M. his wife, to the use of B, eldest son of A, for his life; this was held to be a contingent remainder in B, being created by the same deed as the particular estate. But though it did not appear in the case, yet it afterwards appearing upon examination that by a former deed M. had an estate for life, Lord Hale said the remainder should not be contingent; but the mentioning that the commencement thereof

(a) Fearn, Cont. Rem. 302. (1 Preston on Estates, p. 90.)

(b) Snow v. Cutler, Raym. 162.

(c) Moor v. Parker, 4 Mod. 316. Tit. 38, c. 10.

should be after the death of M., was only expressing when B should take the profits in possession, and did make a contingency; this not being a remainder created by that deed, but a conveyance of the then subsisting reversion or remainder expectant on the death of M. (a)

23. In a modern case, where a person having granted an estate to his eldest son for life, afterwards by his will, reciting that he had settled that estate upon his eldest son for his life, proceeded in these words:—“My will is, and I do hereby, from and after his decease, give and devise the same to the heirs male of his body begotten; and in default of such issue, to the use and behoof of my second, third, fourth, and fifth sons, severally, successively, and in remainder, and of the several heirs male of the body of my said sons,” &c.

The Court held, that the limitation to the heirs male of the body of the eldest son was not a contingent remainder. (b)

24. Where the legal estate is *vested in trustees*, there is no necessity for any preceding particular estate of freehold to support contingent remainders; because the legal estate in the general trustees *will be sufficient* for that purpose. (c)

25. Thus in *Chapman v. Blisset*, it was held by Lord Hardwicke, that if the limitation to Joseph's children was a contingent remainder, the legal estate in the trustees would support it. (d)

26. A devised to trustees and their heirs to the use of them and their heirs, in trust for B for life, remainder to his first and other sons successively in tail, remainder to the future  
248\* sons of C \* successively for life, remainder over. B died without issue in the testator's lifetime. The contingent limitations were taken as executory devises, because no child was then born to C. Afterwards a child was born to C, and died; a subsequent remainder-man claimed the estate, upon a supposition that all the preceding intermediate limitations, which could not vest at the death of such child were destroyed; as it had been decreed, that upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders, upon that executory devise. But it was held that

(a) *Weale v. Lower*, Pollex. 66.

(c) *Fearne*, Cont. Rem. 303.

(b) *Doe v. Fonnereau*, 1 Doug. 486.

(d) Tit. 12, c. 1.

the inheritance in the trustees was sufficient to support the intermediate contingent remainders, until they should come *in esse*, although there was no particular estate to support them; and that the estate should not vest in possession whilst an object of any preceding limitation might come *in esse*. (a)

(a) *Hopkins v. Hopkins*, Forr. 44. 1 Ves. 268. 1 Atk. 581. *Gale v. Gale*, 2 Cox, Rep. 136.

## CHAP. IV.

## OF THE TIME WHEN A CONTINGENT REMAINDER SHOULD VEST.

SECT. 2. *A contingent Remainder must vest during the particular Estate.*

7. *Or at the instant when it determines.*

11. *Posthumous Children take as if born.*

SECT. 17. *A vested Remainder may take effect, though the preceding Estate be defeated.*

19. *A Remainder may fail as to one part, and take effect as to another.*

22. *A Remainder may take effect in some, though not in all.*

SECTION 1. We are now to consider the time at which it is requisite a contingent remainder should vest in interest; that is, at what period, with respect to the duration of the preceding estate, the contingency upon which such remainder is limited to take effect, ought to happen. (a)

2. It is not only necessary that a vested legal freehold estate should precede a freehold contingent remainder, but some such preceding freehold estate must subsist and endure till the time when the contingent remainder vests; that is, till the contingency comes to pass; for it is a *general rule that every remainder must vest during the particular estate, or else at the very instant of its determination.* So that if a lease be made to A for life, and after the death of A and one day after, the land to remain to B for life, this remainder to B is void; because it cannot take effect immediately upon the determination of the preceding estate. (b)

3. This rule was originally founded on feudal principles, and was intended to avoid the inconveniences which might arise by admitting an interval, when there should be no tenant of the freehold to do the services to the lord, or answer to strangers' *præcipes*; as well as to preserve an uninterrupted connection

(a) Fearn, Cont. Rem. 307.

(b) Plowd. 25.



between the particular estate and the remainder, which, in \*the consideration of law, are but several parts of one \*250 whole estate. (a)

4. If, therefore, a lease for life be made, with remainder to the right heirs of J. S., this remainder will never vest, if the tenant for life dies before J. S.; for in that case the particular estate determines before the contingency comes to pass, on which the remainder is limited to take effect, that is, the death of J. S., for *nemo est hæres viventis*. (b)

5. So, where A, seised of lands in fee, makes a lease for years to B, remainder in tail to C, remainder to the right heirs of B; in this case B has nothing in the fee; but it is a contingent remainder to his heir; for B did not take the freehold. If C dies without issue in the lifetime of B, the remainder becomes void; for the foundation and support of this contingent remainder fails, because it ought to have a freehold to support it, when the remainder falls out; but by C's death without issue, living B, the freehold is expired before B can have an heir, and, therefore, the remainder will never take effect. (c)

6. A testator devised to his wife for life, remainder to E., his son, for ninety-nine years, if he should so long live; after the decease of the wife and of E., his son, to the heirs of the body of the said E., but not to descend entirely unto *E.'s eldest son*, but that E. might appoint the same to all his children living at his death; in default of appointment, then to his sons as tenants in common in tail, remainder to his daughters, remainder over. The mother died in the lifetime of E. the son; held, that the limitation to the issue of E., being a contingent remainder, failed by the death of the mother, (who had the only preceding estate of *freehold*,) in E.'s lifetime, for want of a continuing particular estate of freehold to support it. (d) <sup>1</sup>

(a) Tit. 1, § 36.

(b) 1 Inst. 378, a.

(c) Jenk. 248. 2 Roll. Ab. 418.

(d) Doe v. Morgan, 3 Term Rep. 763.

<sup>1</sup> The rule, laid down in *Purefoy v. Rogers*, 2 Saund. 388, is, that where a contingent estate is limited on a freehold, which is capable of supporting the remainder, it shall always be construed a remainder, and not an executory devise; and in such case, if it be not good as a remainder, it is utterly void. In the case in the text, the remainder was contingent, by reason of the uncertainty of the person; E. having no issue when the devise took effect; and his own interest under the will was but a chattel.

7. Although no interval is admitted between the determination of the particular estate, and the vesting of the remainder, yet a remainder may be so limited as not to vest till *the very instant on which the particular estate determines*.

8. Thus, if an estate be limited to B during the life of A, remainder to the heirs of the body of A, this is good; though such remainder cannot vest till the very instant on which the particular estate determines. (a)

9. So, if land be given to A and B, during their joint lives, remainder to the right heirs of him who shall die first, 251 \* this remainder \* will be good, though it cannot vest before the determination of the particular estate. (b)

10. If there be no particular estate *in esse*, nor any present right of entry, when the contingency happens, although the particular estate be afterwards replaced and restored, yet will the remainder never arise. Only it seems that the reversal of a fine by act of parliament will restore a contingent remainder destroyed by that fine, though a reversal for error will not. (c)

11. In consequence of the principle, that where the event, on which a contingent remainder was limited to take effect, did not happen by the time at which the preceding estate determined, it never could arise, or take effect at all, if an estate was limited to A for life, remainder to his first and other sons in tail, *a posthumous son of A could not take*. It was, therefore, the ancient practice, in settlements on unborn sons, to insert a remainder to the intended wife, *ensient* at the death of her husband and her assigns, till the birth of one or more posthumous sons; and from and after the birth of any such posthumous sons, to every of them successively in tail.

John Long devised lands to his nephew Henry for life, remainder to his first and other sons in tail, remainder to his nephew Richard, for life, &c. Henry died without issue, leaving his wife *ensient* with a son. Richard entered as in his remainder, and afterwards the posthumous son of Henry was born. His guardian entered upon Richard, and it was held by the Courts of Common Pleas and King's Bench, that nothing vested in the posthumous son, because a contingent remainder must vest, during the particular estate, or at the moment of its determination.

(a) 1 Inst. 298, a.

(b) 1 Inst. 378, b.

(c) Fearn, Cont. Rem. 315. *Infra*, c. 5.

On an appeal to the House of Lords, this judgment was reversed against the opinion of all the Judges, who were much dissatisfied. (a)

12. The hardship of the determination of the Court of King's Bench, and the discontent of the Judges upon its reversal by the Lords, produced the statute 10 & 11 Will. III. ch. 16; which enacts, "That where any estate shall by any marriage or other settlement be limited in remainder to, or to the use of the first and other son or sons of the body of any person, with any remainder or remainders over, to or to the use of any other person or persons, or in remainder to the use of a daughter or daughters, \*with any remainder or remainders to any \* 252 other person or persons; that any son or sons, daughter or daughters, of such person or persons, that shall be born after the decease of his, her, or their father, shall and may, by virtue of such settlement, take such estate so limited to the first and other sons, or to the daughter or daughters, in the same manner as if born in the lifetime of his, her, or their father."

13. It is somewhat singular that this statute does not mention limitations or devises made by wills. There is a tradition, that as the case of *Reeve v. Long*, arose upon a will, the Lords considered the law to have been settled by their determination in that case; and were, therefore, unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, the words of the act may be construed, without much violence, to comprise settlements of estates made by wills, as well as by deeds (b) <sup>1</sup>

(a) Booth's Op. Vid. Shep. Touchst. p. 530. *Reeve v. Long*, Salk. 227.

(b) Bull. N. P. 135.

<sup>1</sup> It is now the settled law in England and in the United States, that an infant *en ventre sa mere* is deemed to be *in esse*, for the purpose of taking a remainder, or any other estate or interest which is for his benefit, whether by descent, by devise, or under the statute of distributions. See 4 Kent, Comm. 249; *Goodtitle v. Wood*, Willes, 211, 213; 7 T. B. 103, n. S. C.; *Thellusson v. Woodford*, 4 Ves. 227, 321—325, 334, 336, 341, 342; 11 Ves. 112, 138, 149, S. C. in Dom. Proc.; *Swift v. Duffield*, 5 S. & R. 38; *Stedfast v. Nicoll*, 3 Johns. Cas. 18; *Marsellis v. Thalhimer*, 2 Paige, 35; *Harper v. Archer*, 4 Sm. & Marsh. 99. *Post*, tit. 32, ch. 24, § 32; *Louisiana*, Civ. Code, art. 205; *New York*, Rev. St. Vol. II. p. 11, § 30; *Indiana*, Rev. St. 1843, ch. 28, § 74, p. 426; *Illinois*, Rev. St. 1839, p. 157; *Georgia*, Rev. St. 1845, ch. 12, art. 3, p. 332, 333; *South Carolina*, Stat. at Large, Vol. II. p. 542; *Delaware*, Rev. St. 1829, p. 314. See, also, *post*, tit. 29, ch. 2, § 10, note; 4 Kent, Comm. 389. See 24 Am. Jur. 3, note by Metcalf.

14. In a modern case, Lord Roslyn said: "The case of *Reeve v. Long*, certainly overruling Archer's case, had decided that a posthumous child was to be taken to all intents and purposes as born at the time the particular estate determined; it was observed, the decision of that case was contrary to the opinion of the Judges. Undoubtedly, the Court of Common Pleas first, and, upon a writ of error, the Court of King's Bench held differently. But it ought always to be remembered, it was the decision of Lord Somers; and that it was not the only case in which he stood against the majority of the Judges; and the better consideration of subsequent times has shown, his opinion deserved all the regard generally paid to it. What followed was not, as it has been inaccurately stated, that the opinion being against that of the majority of the Judges, it was supposed the Judges would go against that decision. The Statute of William III. was not to affirm that decision; it did by implication affirm it; but it established that the same principle should govern the case where the limitation was by deed of settlement. The manner in which the point has been treated ever since the case of *Burdett v. Hopegood*, (a) and the other cases, from the time of Lord Cowper to that of Lord Hardwicke, proves what the opinion has been upon the propriety of a rule, which it is 253\* \*impossible to say is attended with real inconvenience, and which is according to every principle of justice and natural feeling." (b)

15. A posthumous child is entitled, under the Statute 10 & 11 Will. III., to the intermediate profits of the lands settled, as well as to the lands themselves.

16. A bill was brought by Basset, an infant, against his uncle, to have an account of the real and personal estate of his father, upon which several questions arose. The first related to the real estate, and was this: J. P. Basset, father of the infant, settled the bulk of his estate on himself for life, remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons, remainder to his brother, who was the defendant. Basset, the father, died, his wife *privement ensient*. Basset, the uncle, entered. Eight months after, the son was born, and en-

(a) 1 P. Wms. 486.

(b) *Thellusson v. Woodford*, 4 Ves. 342.

tered upon his uncle; the question was, who should have the intermediate profits from the death of the father to the birth of the son.

Lord Hardwicke. "As to this point, it must depend upon the construction of the Statute 10 & 11 Will. III.; and as to that, it must be considered what was the mischief intended to be remedied, and what remedy the legislature have applied. Now, the defendants say, nothing was intended to be remedied but the vesting of the remainder, which they say was the only evil complained of in the case of *Reeve v. Long*, in the House of Lords, which was the foundation and occasion of that act. But I am of opinion this was not the single mischief that was intended to be prevented, but the whole evil; and they meant not only to give posthumous children power to enter, but to take the profits also, according to the intention of persons making settlements and wills too, of this kind; and this appears both from the title, preamble, and provision of the statute; and the words are so plain that, to put any other construction upon them, would be to repeal the act; which says, such posthumous child shall take in such manner as if born in the life of his father. But it was said by the defendant's counsel, that the words *take, &c.*, meant only that he should take the remainder in such manner as heirs at law by descent take, who have not intermediate profits; and that this being a new law, ought to be considered according \*to the rules of the common law in similar cases; and it \*254 is true it is a usual manner of construing new acts, according to the old rules, but to do so in this case would be repugnant to the words of the act, for heirs by descent do not take as if born in the life of their father: But the addition of these words in the act, 'although no trustees to preserve contingent remainders,' clears this of all objections; and as before that act all accurate conveyancers inserted such limitations, so since, they have left them out, which plainly shows their sense of the statute. But the objections on the part of the defendant are these, that there must be some tenant to the freehold, somebody to answer the *præcipes* of strangers, and this can be nobody but the uncle. As to this, I do not know whether it is material for me to consider it, because I can get at it in another way; but judges in such cases must mould and frame such estates as are agreeable to the plain intention of the legislature. It may vest

in the uncle, and divest upon the birth of a son by relation; and this is agreeable to the construction of law in other instances, as in the case of enrolment of deeds; here, though a person has no title till enrolment, yet from the enrolment, he is in from the time of the execution of the deed.

“As to the objection that there is no legal remedy for the profits against the uncle, I think, if my construction is right, the son might bring an ejectment, and lay his demise to the time of the death of his father, and every body would be estopped to say that he was not born in the life of his father; for how could the defendant take the objection? not till he had entered into the common rule; and though it is at the plaintiff’s peril if he lays his demise before his title accrued, yet, if my construction is right, his title did accrue, and it would be immaterial whether he could or could not in fact make such demise, because such demises are only looked upon as matters of form, and not real, for infants make such demises every day. But suppose this point of law was otherwise, I am of opinion this Court would make the uncle a trustee for the infant, and that seems to me to be the meaning of the act of parliament; and though it is natural to pursue legal remedies, where such are to be had, yet that is no reason, if they are not to be had, why remedies should not be enforced here, I am therefore of opinion the intermediate profits of the estate must go to the infant.” (a)

255 \* \* 17. There are *some few instances* of vested remainders *taking effect, though the preceding estate be defeated;* as where the lessor disseises A, his lessee for life, and makes a lease to B for the life of A, remainder to C in fee; here, though A enters and defeats the estate for life, the remainder to C is good; for having been once vested by a good title, it would be unreasonable that the lessor should have it against his own livery. (b)

18. So if a lease be made to an *infant for life*, with a remainder over; if the infant at his full age *disagree* to the estate for life, yet the remainder is good, having once vested by a good title. (c)

19. From the principle that a contingent remainder must vest at or before the determination of the particular estate, it follows, that an estate limited on a contingency *may fail as to one part,*

(a) *Basset v. Basset*, 8 Vin. Ab. 87. 3 Atk. 203.

(b) 1 Inst. 298. *Fearne*, Cont. Rem. 308.

(c) *Idem.*

and take effect as to another, wherever the preceding estate is in several persons; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it. (a)

20. A feme covert and a stranger being joint tenants for life of copyhold lands, with remainder to the heirs of the body of baron and feme; the stranger surrendered his moiety to the baron and feme, afterwards the baron surrendered the whole to B in fee. The feme died leaving issue; then the baron died.

The question was, whether the remainder to the heirs of the body of the baron and feme vested in the issue. It was adjudged that when the stranger conveyed his moiety to the baron, the jointure between the stranger and the feme covert was severed; when the baron conveyed the whole to B, he took an estate in one moiety for the life of the feme (defeasible by her on the death of her husband,) and in the other moiety, for the life of the stranger; therefore upon the death of the feme the estate in the first moiety was determined, at which time the remainder, as to that moiety, ought to have vested, which it could not do, because the person to take it was to be the heir of the bodies of both baron and feme; but that was impossible during the life of the baron, for *nemo est hæres viventis*; therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all, as to that moiety; so that in this case the remainder failed as to one moiety. (b)

21. Lord Ch. B. Gilbert seems not to approve of the resolution \* in the above case; for by construing the limitation to the heirs of the body of the husband and wife, a contingent remainder, he says, we suppose a deed made and an estate given, where at the very first it appeared that, for one moiety, the deed and estate could have no manner of effect, unless the husband and wife died at one instant of time. Mr. Fearné says this seems to be a mistake, for the original limitation did not involve any such inconsistency; the inconvenience arose from the subsequent acts. The joint estate for life might have continued unsevered between the wife and the stranger; and on the death of the survivor, there might have been an heir of the bodies of the husband and wife capable of taking when the pre-

(a) Fearné, Cont. Rem. 310.

(b) Lane v. Pannel, 1 Roll. Ab. 238, 317, 438.

ceding estate determined, if both husband and wife had died in the lifetime of the stranger, or if both husband and stranger had died in the lifetime of the wife. That the Chief Baron also refers to a case in 3 Leon. 4, of a surrender to the use of the wife for life, remainder to the use of the right heirs of the husband and wife, where the Justices were of opinion that the remainder was executed, for a moiety, in the wife. But that was not only superseded by the contrary decision in *Lane v. Pannel*, but was contrary to the preceding case in *Dyer* 99, 2 Roll. Ab. 416, *Dallison* 20, pl. 8, cited in 2 Leon. 102; as well as to the doctrine of the latter cases. (a)

22. A contingent remainder *may take effect in some, and not in all the persons* to whom it was limited; according as some may come *in esse*, before the determination of the particular estate, and others not. (b)

23. Thus, if a limitation be to A for life, remainder to the right heirs of J and K; here, if J happen to die before A, and K survive A, the heirs of the first may take, but those of the latter, it seems, will be forever excluded; for the heirs of J are *in esse* at the determination of the preceding estate, but not the heirs of K, who is then living. (c)

24. This doctrine, however, seems *confined to limitations at common law*; and does not extend to estates created by way of devise.

25. Thus, in the case of *Doe v. Perryn*, (d) the daughter had no child at the testator's death, but afterwards had three by her said husband, who died in their parent's lifetime. One  
257\* point \* contended for was, that the limitation being to the children in fee, was contingent till the death of the mother; therefore the remainder over took effect on her leaving no child. But it was held that the fee vested in the child first born; afterwards opened and let in those born at subsequent periods.

(a) *Gilb. Ten.* 252.

(b) *Fearne, Cont. Rem.* 460.

(c) 1 *Inst.* 9, u. *Comb.* 467. 1 *Ld. Raym.* 810, S. C. (d) *Ch.* 1, § 53. 3 *T. R.* 484.



## CHAP. V.

## OF REMAINDERS LIMITED BY WAY OF USE, AND CONTINGENT USES.

SECT. 1. <i>Remainders limited by Way of Use.</i>	SECT. 15. <i>Will divest in favor of Persons becoming entitled.</i>
10. <i>There must be a particular Estate to support the Remainder.</i>	18. <i>Contingent Uses.</i>
	20. <i>Springing Uses.</i>
	26. <i>Shifting Uses.</i>
	37. <i>Out of what Seisin they arise.</i>

SECTION 1. *Remainders*, whether vested or contingent, *may be limited by way of use*, as well as by conveyances which derive their effect from the common law; and remainders are now usually created by conveyances to uses.

2. Thus, if a person covenants to stand seised to the use of A for life, remainder to his first and other sons in tail, (A having no sons at the time,) remainder to B in tail, remainder to the covenantor in fee; a use immediately arises, out of the seisin of the covenantor, to A for life, and to B in tail, which are immediately executed by the statute 27 Hen. VIII. c. 10; because in this case there are persons seised to a use, a *cestui que use*, and a use *in esse*. But with respect to the contingent uses limited to the first and other sons of A, they cannot possibly be executed, because there are no *cestuis que use in esse*. The moment A has a son, a use in tail arises to him out of the seisin of the covenantor, who has the reversion in fee of the legal estate in him; and the statute executes the legal estate to such first son, who becomes tenant in tail in remainder of the legal estate, expectant on the determination of A's life-estate. (*a*)

3. Where the conveyance operates by transmutation of possession, as in the case of a fine, recovery, or release to uses, other principles have been adopted to support contingent remainders limited in this manner.

(a) *Wegg v. Villers*, 2 Roll. Ab. 769. 2 Sid. 64. Tit. 11, c. 3.

259\* \*4. Thus if lands are conveyed to trustees and their heirs by fine, recovery, or release, and it is declared that these assurances shall enure to the use of A for life, remainder to his first and other sons in tail, (A having no son at the time,) remainder to B in fee; in this case, the use for life limited to A and the use in remainder limited to B, are immediately executed by the statute, and converted into legal estates; because there are persons seised to a use, a *cestui que use*, and a use *in esse*. But with respect to the contingent uses limited to the first and other sons of A, they cannot possibly be executed, because there is no *cestui que use in esse*. Whenever A has a son, then there is a *cestui que use in esse*; a use therefore vests in such son in tail, and the statute transfers the legal estate to that use.

5. As no use however can be executed by the statute, unless there is some person seised to such use, it was much doubted out of what seisin the use should arise to the first son of A. In a case in 17 Eliz. Lord Ch. J. Dyer says:—“Although by the words of the statute, the freehold of the land, and the fee simple also, which the feoffees receive, are deemed and vested in the *cestui que use* before; yet, *adhuc remanet quædam scintilla juris, et tituli quasi medium quid, inter utrosque status, scilicet, illa possibilitas futuri usus emergentis; et sic interesse et titulus, et non tantum nuda auctoritas seu potestas remanet.*” (a)

6. This doctrine was fully discussed in Chudleigh’s case; and Lord Coke reports the opinion of the majority of the Judges to have been—“That the feoffees since the statute, had a possibility to serve the future use when it came *in esse*, and that in the mean time all the uses *in esse* shall be vested; and when the future use comes *in esse*, then the feoffees, if the possession be not disturbed by disseisin or other means, shall have sufficient estate and seisin to serve the future use, when it comes *in esse*, to be executed by force of the statute; and that seisin and execution by force of the statute, ought to concur at one, and the same time. And this case is not to be resembled to cases at the common law, for an act of parliament may make division of estates; and forasmuch as this division is made by act of parliament, it is not necessary that the feoffees should have their ancient estates.” (b)

(a) Brent’s case, Dyer, 340, b.

(b) 1 Rep. 137, a.

7. They also said "That this construction was just, and consonant to reason and equity; for by this construction the interest and power that every one hath will be preserved by the act; \*for if the possession be disturbed by disseisin or \*260 otherwise, the feoffees will have power to enter to revive the future uses according to the trust reposed in them; and if they by any act bar themselves of their entry, then this case, not being remedied by the act, doth remain as it was at common law.<sup>1</sup>

8. The absolute necessity of supposing some person to be seised to a use, before it can be executed by the statute, was the reason of adopting the doctrine of a possibility of entry, or *scintilla juris*, in the feoffees or releasees to uses. The framers of the Statute of Uses do not appear to have had contingent uses in contemplation when they penned the act, otherwise they would probably have inserted some clause respecting them; and when a case of contingent uses arose, this fiction was resorted to in order to support them. But in Chudleigh's case, (a) the Judges were not unanimous in this opinion; for Lord Ch. Baron Periam and Justice Walmsley held that the intent of the Statute of Uses was, to divest the whole estate out of the feoffees, conusees, or recoverors, and to vest it in the *cestui que use*; so that it would be against the meaning and the letter of the law also,

(a) 1 Rep. 132, b.

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<sup>1</sup> The doctrine of Chudleigh's case may be illustrated to the student, by the case of a feoffment to A in fee, to the use of B for life, remainder to his unborn sons in tail, remainder to C in fee.

The lawyers who followed Chudleigh's case held that the uses to B's sons were served out of a seisin *supposed to remain for that purpose* in A—a *scintilla juris*.

The consequence of this supposition was, that A, B, and C, might, before the birth of a son, convey the whole estate, and thus defeat the remainder in tail, by destroying the estate which supported it.

Others held, and such is now deemed the better opinion, that, by the Statute of Uses, the whole estate was instantly drawn out of A and vested in B for life, and in C *sub modo*, subject to open and let in the contingent estates as they come *in esse*.

If the remainder had not been limited over, the fee would have remained in A, until the contingent estates came *in esse*. *Post*, ch. 8, § 1—13; *Shapleigh v. Pillsbury*, 1 Greenl. 271.

The doctrine of *scintilla juris* is treated with great perspicuity, in 4 Kent, Comm. 238—247; where the learned author concurs in the opinion of Ld. Ch. Sugden, that it is a groundless and absurd fiction. See *post*, ch. 6, § 52, note; Sugden on Powers, ch. 1, § 3.

to say that any estate, or right, or *scintilla juris*, should remain in the feoffees; and the Chief Baron said, that this *scintilla juris* was like Sir Thomas More's Utopia; and that in consequence of the words of the Statute of Uses, "at any time hereafter shall happen to be seised," the seisin which the feoffees had at the beginning, by the feoffment, would be sufficient within the act to serve all the uses, as well future, when they came *in esse*, as present; for there needed not many seisins, nor a continued seisin, but a seisin at any time. So a seisin at one time would suffice; for the statute said "seised at any time" and it would be hard, when the statute required but one seisin, at one time only, that many seisins, at several times, against the intent and letter of the statute, should be required. (a)

9. The doctrine that contingent remainders limited by way of use take effect when they come *in esse*, by means of the possibility of entry, or *scintilla juris* of the feoffees, is said by Lord Hardwicke to depend on such refined and speculative reasonings as are not very easy to comprehend. The consequence of admitting this possibility of entry is, that a right of entry alone is not sufficient to support such uses; but that where the preceding estates are divested, there must be an actual entry to  
261\* restore \* them. This is a very dangerous doctrine, and will therefore be considered in the next chapter. (b)

10. The rule, respecting the necessity of an estate of freehold to support a contingent remainder, holds equally in the limitation of contingent remainders by way of use, as by common-law conveyances. For, although before the Statute of Uses, a feoffment to the use of A for years, remainder in contingency, would have been good; because the feoffees remained tenants of the legal freehold; yet, since that statute, it is otherwise, for no estate remains in the feoffees or releasees to uses.

11. A person conveyed by lease and release to trustees and their heirs, to the use of himself for ninety-nine years, remainder to the use of trustees for twenty-five years, remainder to the heirs male of his own body, remainder to his own right heirs. The Court held that the limitation to the heirs male of the body of the releasor was void; because there was no preceding estate of freehold limited to support it. (c)

(a) 1 Rep. 132, b. 1 Leon. 258.

(b) Garth v. Cotton, *infra*, c. 7.

(c) Adams v. Savage, Salk. 679.

12. Husband and wife covenanted to levy a fine of the wife's land to the use of the heirs of the body of the husband on the wife begotten, remainder to the use of the right heirs of the husband. They had issue that died in their lifetime; afterwards the wife died, living the husband.

It was resolved, that the limitation to the heirs of the husband was void, for want of a preceding estate of freehold to support it; for the husband could not take an estate for life by implication, because the estate belonged to the wife; and supposing an estate for life in the wife by implication, or resulting use, capable of supporting the use to the heirs of the body of the husband on the wife; yet she, as well as their issue, having died in the husband's lifetime, before the limitation to his right heirs could vest, that must have failed as a contingent remainder, for want of a subsisting particular estate to support it, at the time of his death. (a)

13. It appears from the reasoning in the preceding case, that where *the grantor takes a freehold estate by a resulting or implied use*, arising from the same deed, *it will support a contingent limitation* as effectually as if an estate of freehold had been expressly limited to him.

14. So, in the case of *Penhay v. Hurrell*, (b) after solemn argument on the point, and a case stated to the Judges, it was decreed \*that the estate for life which resulted to the cognizor was sufficient to support the contingent limitation to his first and other sons. \*262

15. It has been stated, that a remainder limited by a common-law conveyance may take effect in some, though not in all those to whom it is given. But where a contingent remainder *is limited by way of use to several persons*, who do not all become capable at the same time; notwithstanding it *vests in the person first becoming capable*, yet it will divest, as to the proportion of the persons afterwards becoming capable, before the determination of the particular estate; and they will take jointly, notwithstanding the different times of vesting. (c)

16. A conveyance was made to the use of A the husband for life, remainder to the use of B for life, remainder to all the issues female of their two bodies, and the heirs of the bodies of such issues female. A and B had issue a daughter. Resolved, that

(a) *Davies v. Speed*, Show. Parl. Ca. 104. Salk. 675, n. Tit. 11, c. 4.

(b) Tit. 11, c. 4. 2 Freem. 258.

(c) Tit. 18, c. 1.

the remainder in tail to the issues female was not so attached in that daughter, as not to be divested for a moiety on the birth of another daughter; for such a limitation being by way of use, springs out of the estate, according to the capacity of the person in whom it is to vest. (a)

17. Lands were settled to the use of a wife for life, remainder to the use of her husband for life, remainder to the use of all and every their child or children equally, if more than one, as tenants in common, &c., subject to a power of appointment in the parents. It was held, that the remainder vested in the children on their respective births. (b)

18. Soon after the Statute of Uses, and even so late as 31 Eliz., it was laid down by Lord Chief Justice Popham, in Chudleigh's case, that no limitation of a use, which was contrary to the rules established at common law, respecting the limitation of legal estates, should be executed by the statute; for, otherwise, all the mischiefs intended to be remedied by the act would be continued, or greater introduced. This idea was, however, soon departed from, and advantage taken of an expression in the Statute of Uses, in order to support several of those *contingent limitations to uses* which had been allowed by the Court of Chancery, in declarations of uses, when they were distinct from the legal estate.

19. The Statute of Uses enacts that the estate of feof-  
263\* fees to \*uses shall be in the *cestui que use* "after such quality, manner, form, and condition as they had before, in or to the use, confidence, or trust; that was in them." Now, the *Court of Chancery* having permitted the limitation of a use for life or in tail to arise *in futuro*, without any preceding estate to support it; and also that a use should change from one person to another, by matter *ex post facto*, though the first use were limited in fee; the *Courts of Law*, in process of time, admitted limitations of this kind in conveyances to uses; and determined that in such cases the statute would transfer the possession to the *cestui que use* in the same quality, form, and condition, as he had in the use. (c)

20. With respect to uses limited to arise *in futuro*, without any preceding estate to support them, which are usually called

(a) Mathews v. Temple, Comb. 467. 1 Ld. Raym. 811.

(b) Doe v. Martin, 4 Term R. 39. Mogg v. Mogg, 1 Mer. 654.

(c) Tit. 11, c. 4.

*springing uses*, the first case in which a limitation of this kind was allowed appears to have been determined in 10 Eliz., and is thus reported by Dyer.

21. J. M. being seised of certain lands in fee, levied a fine thereof; and by indenture declared the use of it to be to himself, and to such wife and wives as the said J. M. should happen afterwards to marry, by whatever names she or they might be called, for and during their natural lives, and the life of the survivor of them, with divers remainders over. Afterwards J. M. took to wife one A., and then died. Whether she should take any thing by the said indenture or fine, or not, was the question. By the opinion of Wray and Meade, serjeants, and Plowden and Onslow, solicitors, she might; and thereto they subscribed their names.

Moor states, that the parties, not being satisfied with this determination, the case was carried into the Court of Common Pleas, where it was adjudged in the same manner. (a)

22. The next case that arose on this point was in 37 and 38 Eliz., and is thus reported by Croke:—A person made a feoffment, which was declared to be to the use of himself and A. his wife that should be after their marriage, and of the heirs of their bodies; and took A. to wife. The question was, whether the wife should take by the limitation of this use. Coke, Attorney-General, contended that she should not, for presently by the feoffment the fee was in the husband by the possession executed to the use which he had before the marriage; which could not, after the marriage, be divided, and made an estate tail \*in him, as he had the fee in him till the marriage; \*264 for it might have been that the marriage had never taken effect, and that would have confounded the other use; and uses *in futuro* could not arise upon such future acts, for then a use would rise out of a use. But all the justices held, that although he were seised in fee in the mean time, as in truth he was, yet, by the marriage, the new use should arise and vest. (b)

23. It is said by Lord Chief Justice Holt, that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use. In a modern case this doctrine was

(a) Mutton's case, Dyer, 274, b. Moor, 517.

(b) Woodliff v. Drury, Cro. Eliz. 439. 1 Rep. 136, a. Brent's case, Dyer, 340, a, and Bould v. Winston, Cro. Jac. 168, *infra*, c. 6, § 39, 45.

admitted, and an estate of freehold was allowed to arise *in futuro* upon a covenant to stand seised to uses. (a)

24. Thomas Kirby being seised in fee of the lands in question, executed indentures of lease and release of them to his brother. The lease was made for a year in the usual manner. The release witnessed, that, for the natural love which Thomas Kirby bore to his brother, and in consideration of £100 paid to him by his said brother, the said Thomas Kirby granted, released, and confirmed to his brother, in his actual possession then being by virtue of the lease for a year, after the death of the said Thomas Kirby, all that close, &c., to hold the same to his said brother, and the heirs of his body.

It was admitted that this conveyance was void as a lease and release, because it was a grant of a freehold to commence *in futuro*; but the Court held that it should operate as a covenant to stand seised to uses; and that the estate should vest in the brother as a springing use. (b)

25. In all cases of *springing uses* the estate remains in the original owner till the use arises; where there is no transmutation of possession, the springing use arises out of the seisin of the covenantor or bargainor; where there is a transmutation of possession, the new use arises out of the seisin of the feoffees, releasees, &c. (c)

26. With respect to uses limited so as to change by matter *ex post facto*, which are usually called *shifting or secondary uses*; the following is the first case in which the validity of a limitation of this kind was discussed.

27. A person made a feoffment in fee to the use of W. and his heirs, until A. paid £40 to W., and then to the use of A. and his heirs. A. paid the £40. Some of the Judges held, 265\* that if \* A. entered, he would become *ipso facto* seised in fee; for W. being seised in fee by the Statute of Uses, A. would be able to divest that fee, and transfer it to himself, upon performance of the condition. Others were of opinion that the payment of the money and the entry of A. had no effect, without the entry of the feoffees; and then *quâcunque viâ datâ* the entry would be good, and A. would become seised according to the terms of the deed. To this it was added, that a use might

(a) Salk. 675. 12 Mod. 89.

(b) *Roe v. Tranmer*, 2 Wils. Rep. 75.

(c) (*Shapleigh v. Pillsbury*, 1 Greenl. 271.)



change from one person to another by some act or circumstance *ex post facto*, as well since as before the statute. (a)

28. A., seised of the manor of K., made a feoffment of it to the use of the trustees and their heirs, upon condition that if they did not pay £10,000 in fifteen days, then it should be to the use of the feoffor and M. his wife, remainder to Thomas, their second son, in tail, with divers remainders over. The money was not paid. Resolved, that the uses arose; and, that after the death of the feoffor and his wife, Thomas, the second son, was entitled to the land. (b)

29. A. levied a fine of the manors of D. and S., and declared the uses by deed; as to the manor of D., to the use of B. and his heirs; and as to the manor of S., to the use of A. and his heirs, until B. should be evicted out of the manor of D. by the wife of A.; after such eviction, to the use of B. and his heirs, until he should be satisfied with the profits of the land for the damages received by the eviction. This was held to be a good contingent use of the manor of S., so that nothing vested in B. till an eviction. (c)

30. A., tenant for life, and R., entitled to the reversion in fee, covenanted to levy a fine to the use of A. and his heirs, if R. did not pay him 10s. on the 10th of September following; and if he did pay it, then to the use of A. for life, remainder to the use of R. in fee. It was held, that A. had an estate in fee, till R. paid the 10s. (d)

31. Mary and Penelope Tannott being seised in fee as co-heirs, in consideration of £4000 paid to Mary by Carew, and of a marriage which soon afterwards took place between Penelope and Carew, the said Mary and Penelope conveyed all their estates to trustees and their heirs, to the use of Carew for life, remainder to Penelope for life for her jointure, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Carew and Penelope successively in tail male, remainder \*to the daughters in tail, with the ultimate \*266 remainder to Carew and his heirs forever; subject to a proviso that, if it should happen that no issue of the said Carew by the said Penelope should be living at the decease of the survivor of them, and the heirs of the said Penelope should,

(a) Bro. Ab. tit. Feoff. 2. Use, pl. 30.

(b) Harwell v. Lucas, Moo. 99. 1 Leon. 264.

(c) Kent v. Steward, 2 Roll. Ab. 792. Cro. Car. 358. (d) Spring v. Cæsar, 1 Roll. Ab. 418.

within twelve months after the decease of the survivor of the said Richard and Penelope, dying without issue as aforesaid, pay to the heirs or assigns of the said Carew £4000, that then the remainder in fee simple so limited to the said Carew and his heirs should cease, and the premises should remain to the use of the right heirs of the said Penelope forever. It was held, that this was a good shifting use; and the decree was affirmed in the House of Lords. (a)

32. In *settlements* made on the younger sons of noble families there are provisos frequently inserted, that if the family estate and title shall descend on such younger sons, the estate limited to them, in such settlements, shall cease, as if they were dead without issue, and shall go over to the person next in remainder; which is a *shifting use*.

33. W. Nicolls devised his real estates to trustees, in trust to receive the rents and profits, and, after paying certain annuities, to pay the surplus to his brother, Edward Nicolls, for sixty years, if he should so long live, from and after the expiration of the said term, or the decease of the said Edward Nicolls; then to stand seised to the use of the first and other sons of Edward Nicolls, and the heirs of their bodies severally and successively, remainder over; provided, that if the said Edward Nicolls, or the heirs of his body, should become seised of the estates of William Trafford, then the trusts thereby declared for the use of the persons who should become seised should cease, determine, and be absolutely void; and the trustees should stand seised to the use of the person next in remainder under his will, in the same manner as he or she would be entitled, if the person so seised of Trafford's estate was or were actually dead. The estate of Trafford came to Edward Nicolls. Held, that the estate which he took under the will ceased, and vested in his eldest son, being the next person in remainder. (b)

34. Thomas Heneage devised his real estates to trustees, to the use of his son, G. F. Heneage, for life, remainder to the use of the same trustees and their heirs, during the life of the said G. F. Heneage, in trust to preserve the contingent uses 267\* and \* estates thereafter limited; nevertheless, to permit

(a) Lloyd v. Carew, Show. Parl. Ca. 137.

(b) Nicolls v. Sheffield, 2 Bro. C. C. 217. Stanley v. Stanley, 16 Ves. 491. Doe v. Yates, 5 Barn. & Ald. 344.

the said G. F. Heneage to receive the rents thereof during his life, remainder to his first and other sons in tail male, remainder over; with a proviso, that if the said G. F. Heneage, or any son of his, should take his elder brother's estate, then the limitations and estates thereby created and given to the said G. F. Heneage and his sons should cease and be void, and the person next in remainder should succeed, as if the said G. F. Heneage, or any such son or sons of his, was or were dead. G. F. Heneage succeeded to the estate of his father's elder brother, before he had any child; but afterwards he had two sons. Held, that the limitation to the trustees to preserve contingent remainders, continued during the whole of the life of G. F. Heneage, so as to support the shifting use; therefore that the second son of G. F. Heneage took the estate devised. (a)

35. It is the same where a proviso is inserted, that if a person to whom an estate is limited shall not assume the name and arms of the settlor within a certain period, the estate shall cease and determine, as if the person so refusing to assume such name and arms were dead without issue; and shall go to the person next in remainder, under the limitations contained in such settlement. (b)

36. It has been resolved, that as contingent uses were only allowed, in order to give persons power to provide for the exigencies of their families; wherever there was a preceding estate capable of supporting a subsequent contingent limitation, it should be construed to be a contingent remainder, and not a springing or shifting use. (c)

37. Where *springing or shifting uses* are created *without transmutation of possession*, they arise out of the *seisin of the covenantors or bargainors*; but where they are created *by a transmutation of possession*, they are said by some, to arise out of the *seisin of the feoffees*, releasees, &c. Thus, the late Mr. Booth says:—"In all future or executory uses, there is, the instant they come in *esse*, a sufficient degree of *seisin* supposed to be left in the feoffees, grantees, &c., to knit itself to, and support, those uses; so as that it may be truly said, the feoffees or grantees stand seised to those uses; and then, by force of the

(a) Doe v. Heneage, 4 Term R. 13. Fearné, Cont. Rem. App. No. 6. Carr v. Errol, 14 Ves. 478.

(b) 1 Inst. 327, a, n. 2. 1 Sanders on Uses, 146.

(c) Carwardine v. Carwardine, 1 Eden, 27. 2 Doug. R. 757.

statute, the *cestui que use* is immediately put into the actual possession." (a)

268 \*      \* 38. A contingent use cannot, therefore, arise out of the seisin of any prior *cestui que use*. Thus it is laid down by four of the Judges in Chudleigh's case, that if A enfeoff B in fee, to the use of C and his heirs, with a proviso that if D pay C £100, then that C and his heirs shall stand seised to the use of D and his heirs; this is utterly void; for the future use ought to be raised out of the estate of the feoffee, and not out of the estate of the *cestui que use*. (b)

The doctrine, that contingent uses arise from a seisin supposed to be left in the feoffees, will be considered in the next chapter.

(a) Tit. 11, c. 4. Booth's Opin. in Shep. Touch. App.

(b) 1 Rep. 137, a

## CHAP. VI.

HOW CONTINGENT REMAINDERS AND CONTINGENT USES MAY BE  
DESTROYED.

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| <p>SECT. 1. <i>Determination of the particular Estate before the Contingency.</i></p> <p>8. <i>A Conveyance by Way of Use will not destroy a Remainder.</i></p> <p>9. <i>Nor a Conveyance by a Cestui que Trust.</i></p> <p>10. <i>A Forfeiture sometimes destroys a Remainder.</i></p> <p>13. <i>An Extinguishment of the particular Estate destroys it.</i></p> | <p>SECT. 15. <i>And also an Alteration in its Quantity.</i></p> <p>28. <i>How Remainders by Way of Use are destroyed.</i></p> <p>29. <i>Where created without Transmutation of Possession.</i></p> <p>33. <i>Where created by Transmutation of Possession.</i></p> <p>38. <i>How springing and shifting Uses are destroyed.</i></p> <p>49. <i>Observations on the Doctrine of the Scintilla Juris.</i></p> |
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SECTION 1. It has been shown that a legal remainder must vest *in esse*, or in right of entry, either during the existence of the particular estate, or at the very instant of its determination, otherwise it will never take effect at all; consequently, *every such determination of the preceding estate, before the contingency happens, as leaves no right of entry, must effectually destroy such contingent remainder. (a)*

2. Thus, where a gift in tail was made to A. C., the remainder to the right heirs of A. S., and the donee made a *feoffment* to a stranger in fee, and afterwards A. S. died. It was held, that his right heir should not have the remainder; for the estate of the land was, by the feoffment of the tenant in tail, divested and discontinued, and all estates vested in the feoffee; and there was not any particular estate, neither *in esse*, nor in right, to support the remainder when it should fall. (b)

3. It is the same where a tenant for life, with a contingent re-

(a) Fearn, Cont Rem. 216.

(b) 1 Rep. 135, b.

mainder expectant on his estate, makes a *feoffment* of his estate for life; it destroys the contingent remainder.<sup>1</sup>

270 \* \* 4. Lands were devised to Robert Archer for life; afterwards to his next heir male, and to the heirs male of the body of such next heir male. Robert Archer made a *feoffment* of his estate. Adjudged, that the devise to the heir male was a contingent remainder, and was destroyed by the feoffment; for every contingent remainder ought to vest, either during the particular estate, or *eo instanti* that it determines. If the particular estate be ended or determined, in fact or in law, before the contingency falls, the remainder is void. (a)

5. A *fine* levied, or a *recovery* suffered, by a particular tenant, in most cases, destroys a contingent remainder, expectant on such particular estate; because such fine or recovery bars and destroys the particular estate. (b)

6. A *surrender* by a tenant for life, of his life-estate, will destroy a contingent remainder limited upon such estate for life.

7. A person was tenant for life, with remainder to his first and other sons in tail, remainder over in tail. The tenant for life, before he had a son, surrendered his life-estate to the person in remainder. The tenant for life afterwards had a son; and the Court held that the surrender, if good, would have destroyed the contingent remainder to the unborn son. But the surrender was adjudged void, because it appeared that the tenant for life was *non compos* at the time he made the surrender. (c)<sup>2</sup>

(a) Archer's case, 1 Rep. 66. Pollex. 389.

(b) *Id.* tit. 35 & 36. See also Hasker v. Sutton, 1 Bing. 500. Doe v. Howell, 10 Bar. & Cr. 191. (Abbott v. Jenkins, 10 S. & R. 296. And see Lyle v. Richards, 9 S. & R. 322. Dunwoodie v. Read, 3 S. & R. 435. Waddell v. Rattew, 5 Rawle, 231.)

(c) Thompson v. Leach, 2 Vent. 198, S. C. 2 Salk. 427. Fearne, Cont. Rem. 317.

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<sup>1</sup> It is expressly enacted in *Mississippi*, Rev. St. 1840, How. & Hut. Dig. p. 348, § 25, that an alienation by the tenant of the particular estate, or its union by purchase or descent, shall not operate to defeat, impair or in any wise affect the remainder. In *Indiana*, the provision is more general in terms, it being enacted that no determination of the particular estate, before the happening of the contingency, shall defeat a remainder otherwise valid. Rev. St. 1843, ch. 28, § 63, 65, p. 425. And such, except as to estates tail, is the law in *Maine*; Rev. St. 1840, ch. 91, § 10, 11; and in *Massachusetts*; Rev. St. ch. 59, § 7, 8; and in *New York*; Rev. St. Vol. II. p. 11, § 32, 33. And see 4 Kent, Comm. 252.

<sup>2</sup> See *post*, tit. 32, ch. 2, § 23, and ch. 4, § 24. But the conveyance of a person *non compos* is now held voidable only, and not absolutely void. Wait v. Maxwell, 5 Pick. 217; Beverley's case, 4 Rep. 125, a.

8. If there be tenant for life, with contingent remainders thereon, a *bargain and sale*, or *lease and release by the tenant for life*, will not destroy the contingent remainders; because these conveyances only transfer what the person seised of the land may lawfully convey, and do not divest any estate. (a)

9. A person who has only a trust estate cannot by any mode of conveyance destroy a contingent remainder expectant on his estate; for the legal estate being in his trustees, there remains a right of entry in them, which will support the remainders. (b)

10. There are some *acts of a tenant for life*, which though they amount to a forfeiture of his estate, so as to give to a vested remainder-man a title to enter, if he pleases, yet as they do not *discontinue, divest, or disturb any remainder or subsequent estate*; nor make any alteration in, or merger of the particular estate, they do not, therefore, as it seems, destroy or affect a contingent remainder; unless advantage is taken of the forfeiture by any subsequent remainder-man. (c)

\* 11. Thus, if tenant for life accepted a fine from a \*271 stranger, it was a forfeiture of his estate, so as to entitle a remainder-man to enter; and yet it did not displace or divest the remainder or reversion. (d)

12. So, where A was tenant for life, remainder to his first son in tail, &c., remainder to B for life, remainder to his first son in tail, &c., A, having a son, accepted a fine from B, then made a feoffment in fee; afterwards B had issue a son. Resolved, that the acceptance of the fine displaced nothing; and though A's feoffment displaced all the estates, yet the right of entry in the son of A supported the contingent remainders. (e)

13. A contingent remainder may, however, be *destroyed by an act, which*, though it does not discontinue or divest any remainder or subsequent contingent estate, yet *extinguishes the particular estate* on which the contingent remainder depends; by which the contingent remainder is destroyed.

14. This has been already seen in the instance of a surrender to the person entitled to the next estate in remainder. So where a feme covert was tenant for life, with remainder to her first son, and before the birth of a son, the remainder in fee was conveyed

(a) Tit. 32, c. 10. (b) Fearn, Cont. Rem. 320. *Ante*, c. 3, § 24. 1 M'Cl. & Yo. 55, 58.

(c) Fearn, Cont. Rem. 323.

(d) 1 Inst. 252, a. Tit. 35, c. 9.

(e) Lloyd v. Brooking, 1 Vent. 188.

to the husband and wife by fine. Held, that the contingent remainder was destroyed by the extinguishment of the particular estate. (a)

15. It has been frequently laid down that *any alteration in the nature of the preceding estate, before the remainder vests, will destroy such remainder*. As if lands be given to A in tail, and if J. S. comes to Westminster Hall such a day, remainder to him in fee, if the lands descend from A to two co-parceners, who make partition, the fee shall not accrue to J. S., though he should come to Westminster Hall at the day. So if lands be given to A and B for the life of C, remainder to the right heirs of the survivor of A and B, and A release to B, the remainder is destroyed. (b)

16. Notwithstanding these *dicta*, Mr. Fearne was of opinion that the alteration in the particular estate, which would destroy a contingent remainder, must amount to an alteration in its quantity, and not merely in its quality; and thought this conclusion was warranted by the two following cases. (c)

17. The first is that of *Lane v. Pannel*, which has been already stated, where it seems that the severance of the jointure between the two joint tenants for life did not destroy the 272\* contingent remainder, limited after their joint estate; for there it is adjudged that, because the remainder could not vest at the death of one of them, (after the severance of the jointure,) such remainder was gone, as to one moiety of the lands. Now this judgment was nugatory and groundless, if the severance itself destroyed the remainder as to the whole. This, it is true, was the case of a surrender of copyhold lands; but no distinction was taken on that ground. (d)

18. The other case was, where lands were settled to the use of P. and S. his daughters, for their lives, remainder to the use of the first and other sons of S. in tail male, remainder to her daughters, remainder to the heirs of P. Afterwards S., before the birth of a son, by deed, released all her right and estate to the use of P. and his heirs. The question was, whether the contingent remainder limited to the first son of S., was destroyed by her release to her father. Adjudged, that his release by one

(a) *Ante*, § 7. *Purefoy v. Rogers*, 2 Saund. 880. 4 Mod. 284.

(b) 4 Leon. 237. *Fearne, Cont. Rem.* 337.

(c) *Idem*.

(d) *Ante*, c. 4. 1 Roll. Rep. 238, 317, 438.



joint-tenant for life to another did not destroy the contingent remainder. (a)

19. Lord Hale is reported to have laid it down, that in all cases where the particular estate is merged in the reversion, the contingent remainders are destroyed, though there be no divesting of any estate; and the case of *Purefoy v. Rogers*, is cited in support of this opinion. It is, however, observable, that in the above case the union of the particular estate and the inheritance, arose from the conveyance or act of the parties. But where a particular estate is limited with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the *same* conveyance, the contingent remainder is not destroyed; for where by the same conveyance a particular estate is first limited to a person, with a contingent remainder over to another, with such reversion or remainder to the first person, as would in its own nature drown the particular estate first given him, this last limitation shall be considered as executed only *sub modo*; that is, upon such condition as to open and separate itself from the first estate, when the condition happens; and by no means destroy or preclude the contingent estate. (b)

20. Thus, in *Lewis Bowles's* case, it was resolved, that till issue the husband and wife were seised of an estate tail, executed *sub modo*; that is, till the birth of issue male; then by operation \* of law, the estates were divided, and the hus- \* 273 band and wife became tenants for their lives, remainder to their issue in tail male, remainder to the heirs of the husband; the estate limited to them for their lives not being merged. (c)

21. Where the inheritance becomes united to the particular estate, by an immediate descent from the person by whose will the particular estate and contingent remainders were limited; there the contingent remainder will not be destroyed.

22. Thus, in *Archer's* case, notwithstanding the reversion in fee must have descended on Robert, the devisee for life, upon the death of his father, the testator, yet he was adjudged to be only tenant for life, with contingent remainder to the next heir male. (d)

23. So, where a person devised lands to T., his eldest son, for life; if T. should die without issue living at his death, then to

(a) *Harrison v. Belsey*, Raym. 413.

(b) 2 Saund. 386.

(c) *Ante*, c. 1. *Vide Meredith v. Leslie*, tit. 16, c. 10.

(d) *Ante*, § 4.

L. another of the testator's sons, in fee; but if T. should have issue living at his death, then to the right heirs of T. forever. Resolved, that T. was tenant for life, with remainder in fee in contingency; and that the descent of the fee upon him as heir, at the death of his father, did not destroy the contingent remainder. (a)

24. In a modern case, Lord Eldon observed, that in the case of *Plunkett v. Holmes*, the Court would not hold that the estate for life, limited to the heir at law, was merged by the subsequent limitation to him, of a contingent remainder in fee; for that remainder was not executed. They held, therefore, that the eldest son took an estate for life; which being sufficient to support the remainder in fee to the second son, and also the remainder in fee to the eldest son, as contingent remainders; they determined that these limitations should be supported as contingent remainders. (b)

25. Mr. Fearne has observed, that the contingent remainders were destroyed by the immediate descent of the inheritance upon the devisee of the particular estate, then the will creating such remainders would be *ipso facto* void; for the particular estate given by such will would be destroyed by the descent which such will permitted. But where the descent of the inheritance on the particular estate is only mediate from the person whose will created the particular estate and remainder, there can be no such inconsistency in supposing the contingency to be  
 274 \* destroyed by \* the descent; for in all such cases the particular estate is created, and takes effect with a capacity of being afterwards destroyed by those accidents to which the nature of such an estate is generally subject; such as forfeiture, merger, &c. Its immediate destruction is not necessarily involved in the mode of its creation, as it must, in the former case, under the same construction. There can be no necessity, therefore, to exempt the particular estate in these cases from the operation of merger by descent in order to give such particular estate any existence, as there is in the former case. (c)

26. A, the father, being tenant for life, remainder to his son B for life, remainder to the first son of B in tail, remainder to the heirs of the body of A. Before B had any son A died. The

(a) *Plunkett v. Holmes*, Raym. 28.

(b) *Doe v. Scudamore*, 2 Bos. & Pul. 297.

(c) *Fearne*, Cont. Rem. 503. *Crump v. Norwood*, 7 Taunt. 362.

Court held, that the contingent remainder to the first son of B, was destroyed by the descent of the estate tail upon B. (a)

27. Lands were conveyed to the use of A and his wife for life, remainder to the use of B, the son of A, for his life, remainder to the first and other sons of B in tail, remainder to his daughters in tail, remainder to A in fee. A and his wife died in the lifetime of B, who afterwards died without issue, leaving a wife. (b)

The question was, whether the wife was entitled to dower in the lands. Decreed she was; and Lord Hardwicke, with one of the Judges, was of opinion that the estate for life in B was merged by the descent of the inheritance upon him, and the contingent remainder destroyed. (c)

28. With respect to *the manner in which contingent remainders, limited by way of use, may be destroyed*; a distinction must be made between the remainders limited in conveyances operating *without transmutation* of possession, and conveyances operating *by transmutation* of possession.

29. As to the *first*, we have seen that where contingent remainders are created by a covenant to stand seised, or a bargain and sale, the seisin of the covenantor or bargainor supports or feeds the contingent remainders when they arise; and, therefore, if in a case of this kind the covenantor or bargainor conveys away his estate, before the event happens on which the remainder is to arise, but without divesting the subsequent estates, or taking away the right of entry of the persons entitled to them, and any of those persons make an entry, the subsequent uses will be revived. For although we have seen the *present*

*\* right of entry* is alone sufficient to support a contingent remainder, created by a *common-law conveyance*; yet as there must be a seisin to a use, before it can arise, an opinion has prevailed since Chudleigh's case, that a *right of entry* is *not sufficient* to support a contingent remainder, *limited by way of use*, but that there must be an actual entry in order to restore the seisin, out of which the use is to arise; and, therefore, that any conveyance by the covenantor, which divests his estate, and takes away the right of entry, will effectually destroy all contin-

(a) Kent v. Harpool, 1 Vent. 306. T. Jones, 76.

(b) Hooker v. Hooker, Rep. Temp. Hardw. 13.

(c) Duncomb v. Duncomb, 3 Lev. 437.

gent uses limited to arise out of such estate, by divesting the seisin from which such contingent uses are to arise.

30. Lord Coke, on the marriage of his daughter with Sir James Villers, covenanted to stand seised of certain lands, to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to the use of the first and other sons of his daughter in tail male, with the reversion in fee to himself.

Sometime after this settlement was made, Lord Coke by deed, reciting the settlement, granted his reversion to a stranger, without consideration; and soon after he made a feoffment of the lands, with livery of seisin. After the death of Lord Coke, his wife entered, and died seised, having survived the daughter.

A question arose, whether the contingent use, which was limited to the first son of the daughter, was destroyed or not, by Lord Coke's grant of the reversion, or his feoffment of the land. After great consideration, it was resolved that the grant of the reversion did not destroy the contingent remainder; for as it was made without consideration, and the uses of the settlement were recited in it, there was both privity of estate and confidence in the person; so that the grantee of the reversion stood seised to the former uses. As to the feoffment, it was agreed that it divested all the estates, and among the rest the seisin of the grantee of the reversion, but did not bar the entry of the grantee of the reversion; therefore, when the wife entered, after the death of Lord Coke, she thereby reinstated all the divested estates, and among the rest the estate and seisin of the grantee of the reversion; which was the estate and seisin that was to serve the contingent use. (a)

31. It was held by Lord Chief Justice Glyn, that if in the above case the feoffment had been made before the grant  
276\* of the \*reversion, the contingent uses would have been forever destroyed; for the only seisin which could support them was that of Lord Coke, which would have been destroyed by the feoffment; but Lord Coke had already transferred that seisin to the grantee of the reversion. If he had not departed with that seisin, the contingent uses must have been forever

(a) *Wegg v. Villers*, 2 Roll. Ab. 796. 1 Vent. 188. 2 Sid. 64. Tit. 11, c. 4.

destroyed; as no entry by his wife or daughter could have re-vested the original seisin of Lord Coke; nor could he himself have entered against his own feoffment. (a)

32. Lord Coke was compelled to make this settlement by an order of the council; but that he might have the power of preserving or defeating the contingent uses, he made this grant and feoffment, with an intention, in case he chose to preserve the contingent uses, to destroy the feoffment, and produce the grant; but if he thought proper to defeat the contingent uses, then to destroy the grant, and produce the feoffment. Death prevented him from carrying this ingenious scheme into execution. (b)

33. With respect to the manner in which contingent remainders created in conveyances to uses, which operate by transmutation of possession, may be destroyed, we have seen that in Chudleigh's case a majority of the Judges held that the contingent uses were supported by a *scintilla juris*, or possibility of entry, left in the feoffees or releasees; but that this *scintilla juris*, or possibility of entry, must continue undisturbed till the event happens on which the contingent use is to arise. For if the preceding estates be divested before the event happens, then the *scintilla juris*, or possibility of entry of the feoffees or releasees to uses, is destroyed, as well as the other estates; and there being no seisin to the contingent use, when the event happens on which it is limited, it can never arise, unless such *scintilla juris*, or possibility of entry, is revived. (c)

34. It follows that *where particular estates, limited by way of use, are divested and turned to a right, all subsequent contingent uses are thereby destroyed*; unless some of the persons entitled to the preceding particular estates, or the feoffees or releasees to uses, or their heirs, make an actual entry, in order to re-vest the particular estates; for otherwise the *scintilla juris*, or possibility of entry of the feoffees or releasees to uses being divested, no \*seisin will exist to the contingent use when it arises, and \*277 consequently the statute cannot transfer the possession. ■

This doctrine, however, has never been established by any positive judgment; and appears so doubtful, that it will be examined at the end of this chapter.

35. A contingent remainder limited by way of use, may be

(a) 2 Sid. 159.

(b) Gilb. Uses 194.

(c) *Ante*, c. 5, § 6.

*destroyed by the destruction of the particular estate, before the event happens on which such contingent remainder is to arise.*

36. Sir Richard Chudleigh enfeoffed several persons of his estate, to the use of the feoffees and their heirs, during the life of Christopher Chudleigh his eldest son, (who had killed a gentleman and fled into France,) remainder to the use of the first and other sons of his eldest son in tail. Before the birth of a son, the feoffees enfeoffed Christopher Chudleigh of the lands in question in fee simple, without consideration, and with notice of the uses; afterwards, Christopher Chudleigh had a son; the question was, whether the contingent remainder to him was barred by the feoffment.

It was adjudged, upon solemn argument in the Exchequer Chamber, that there being no son of Christopher to take, when the particular estate determined by the feoffment, which was a forfeiture, the son could never after take; for that a remainder in use ought to vest during the particular estate, or at least *eo instanti* when it determines, as well as a remainder at common law. (a)

37. A person conveyed his lands, by feoffment, to the use of himself and his wife, and to the heirs of the survivor of them. The husband afterwards made a feoffment of the land and died.

Resolved, that the right of entry in the wife was not sufficient to support the contingent remainder, and vest it in her on the death of her husband; for the particular estate was not subsisting at the husband's death, when the fee should have vested, because the second feoffment had destroyed it during the coverture; and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient; for it should have been then actually existing. (b)

38. With respect to the manner in which springing and shifting uses may be destroyed, as *there must be a seisin to every contingent use when it arises*, it follows that where such  
278\* \* *seisin is destroyed*, before the event happens on which the springing or shifting use is to arise, *the use also will be destroyed.*

39. A person made a feoffment to the use of D., his wife, for

(a) Chudleigh's case, 1 Rep. 120. Poph. 70.

(b) Biggot v. Smith, Cro. Car. 102. 1 Ld. Raym. 316.

her life ; in case the feoffor should survive his said wife, then to the use of the feoffor and such person as he should happen to marry, for their lives, remainder to a stranger in fee. The person in remainder, together with the feoffees, by the consent of the feoffor, made a feoffment of the lands to new feoffees, to other uses ; and the feoffor levied a fine to the new uses. D., the wife of the feoffor, died ; afterwards, he married a second wife, and died. The second wife entered, claiming under the first feoffment.

Mounson and Harper were of opinion that her entry was lawful. But Dyer and Manwood contended that the contingent use limited to her by the first feoffment was destroyed by the second feoffment and fine ; because the seisin of the first feoffees was thereby divested. Judgment was entered for the widow by assent of the parties ; but in Chudleigh's case, Anderson is reported, by Lord Ch. J. Popham, to have said :—" And for Brent's case, I have always taken the better opinion to be, that the wife cannot take in that case, for the mean disturbance, notwithstanding the judgment, which is entered thereupon, which was by assent of the parties, and given only upon a default made after an adjournment upon the demurrer."

In the same case, Lord Coke reports that Gawdy said of Brent's case :—" If the husband makes the feoffment in fee, before the taking wife, the wife shall never take ; for the possession and estate of the land is altered, changed and transferred to the possession of another, before the title of the wife doth accrue. But if no divesting or alteration had been, then the use shall vest in wife." (a)

40. A devise of land out of which a future use is limited, will destroy such future use ; but a devise of portions out of land will not destroy it ; for such a devise does not alter the freehold. (b)

41. A levied a fine to the use of himself and his heirs, till a marriage had between B, his son, and M, and after to the use of A for life, remainder to B in tail, &c. A, by his will, devised portions to his daughters out of the land, and died ; afterwards the marriage between B, his son, and M took place.

The two Chief Justices refused, on account of the diffi-

(a) Brent's case, Dyer, 340, a. 2 Leon. 14. Poph. 76. 1 Rep. 136, a.

(b) Gilb. Uses, 126.

279\* culty, \* to resolve the case; they, however, inclined clearly, that if there had been a devise of the land, it would have interrupted the rising of the future use. But they doubted, because he devised portions out of the land only, and did not devise the land itself. (a)

42. Where future uses are limited, and the *freehold* is not conveyed away or divested, but *only a term for years* is limited, or a rent granted out of the lands, the *future uses will not be totally destroyed*; because the seisin out of which they are to arise, is not divested; but such lease or rent will bind the future uses. (b)

43. Sir John Russell covenanted by indenture, in consideration of a marriage to be had between him and Lady Russell, to stand seised, to the use of himself and his heirs, till the marriage; after to the use of himself and Lady Russell, and the heirs of his body, remainder over. Subsequent to the execution of this deed, but before the marriage, Sir John Russell made a lease of the lands for thirty-one years, to commence from the determination of a former term. The marriage took effect; and upon the death of Sir John Russell, his widow entered. The question was, whether her entry was lawful or not.

Tanfield. "The point is double. 1. Whether the lease shall destroy the future use. 2. If it shall not destroy it, whether it shall not bind the future use. For it ought to arise out of the estate which the covenantor had at the time of the covenant; which estate ought to continue without alteration till the time that the use shall arise, which is not here, for this is a term in reversion. To the second, this lease made upon good consideration before the use did arise shall bind it; for the use shall not otherwise be executed, than if it had been at the common law. And a lease made *bond fide* to one who had not notice thereof, shall bind it."

Popham. "The statute executes only uses *in esse*, and not any contingent uses, until they happen *in esse*; then this use was merely void until marriage, for there was not any new estate in him; and if he, after that covenant, had made a feoffment, or a gift in tail, to one who had not any notice thereof, it would questionless never have arisen. And as at the common law

(a) *Strangeways v. Newton*, Moo. 731.

(b) *Gilb. Uses*, 126.



feoffees might destroy uses *in esse*, so now may he out of whose estate a future use is to be raised, for the freehold is destroyed \*out of which it should arise; and whether \*280 the lease for years should altogether destroy the arising thereof, is not in this case material; but clearly it shall bind the contingent use; and so resolved in *Strangeways'* case. And at the common law, it is clear that the *cestui que use* shall not avoid such a lease made by the feoffees upon good consideration, no more than a contingent use at this day."

Fenner agreed—"That if a freehold be conveyed to one upon consideration, the future use shall not arise; for there is not any person seised to that use when it should arise. But this lease will not destroy or hinder it; for the same freehold remains, and the use is annexed to the lease, and, therefore, the lease shall not disturb nor bind it."

Clench—"Agreed with him for this last reason; but it was adjourned."

This case appears to have been again argued in 43 & 44 Eliz., when Gawdy, Popham, and Clench held—"That the lease made (whereout the use did arise) was good, and should bind the future use, as a lease by feoffees, made upon a good consideration, shall bind *cestui que use* at common law. But it shall not destroy the whole future use, but shall stand for the freehold, because the seisin is not changed." And Popham said—"That he had conferred with divers of the other Justices at Serjeants' Inn, who agreed with this opinion." But Fenner, *à contra*—"Because the lease did not disturb the freehold when the use is executed, this shall relate to the limitation, and shall bind all mesne acts; and, therefore, shall not bind the feme as to her jointure; wherefore it was adjourned. (a)

44. In another case, which was argued about the same period, Popham and Anderson appear to have been clearly of opinion that a lease for years would prevent the arising of a future use. But in the following case, the contrary doctrine seems to have prevailed. (b)

45. Sir H. Winston covenanted by indenture, in consideration of natural love and affection to William Winston, his eldest son, to stand seised to the use of his said son for life, remainder

(a) *Wood v. Reignold*, Cro. Eliz. 764, 854. *Ante*, § 41.

(b) *Barton's case*, Moo. 743.

to such wife as he should marry for life, remainder over. Afterwards, the said W. Winston being unthrifty, and in Gloucester jail, Sir H. Winston, to disturb the rising of the use to the  
281 \* \* woman whom his son should marry, made a lease of the land for a thousand years to his younger son. W. Winston married the jailer's daughter, and died without issue. The question was, whether this lease was good against his widow.

Croke reports the Court to have been of opinion that the lease should not bind the estate of the wife, because there was a good estate by the first limitation; which, if not destroyed, could not be charged or encumbered, after it was raised; for it had relation to the first covenant, and none had interest to charge it: and that the lease should not destroy it, but must be construed to arise out of the reversion which Sir H. Winston had, and might lawfully charge.

Noy, who has reported this case by another name, says, the Court thought the lease for years did not hinder the rising of the contingent use; but that the lease has in this case took effect as a future interest, out of the fee that was in the covenantor, after the estate determined; and at the worst the wife should have the reversion and rent during her life. (a)

46. The determinations in the preceding cases are very unsatisfactory, and are contradicted by others of equal authority.

Thus, where a tenant for life levied a fine to the reversioner in fee, and the uses of it were declared, to the cognizee and his heirs, upon condition that he would pay an annuity to the cognizor, the tenant for life, and in default of payment that the use should be to the cognizor for life, and one year more: The cognizee made a feoffment of the land; and it was determined that this feoffment did not destroy the future use, which was to arise upon default of payment of the annuity. (b)

47. In the case of *Lloyd v. Carew*, the last in which this point arose, Richard Carew and Penelope his wife, levied a fine for the express purpose of destroying the contingent use; and yet the House of Lords determined that the contingent use arose, and that the fine could not bar the benefit of the proviso; for that the same never was, nor ever could be, in Penelope who levied the fine. (c)

(a) *Bould v. Winston*, Cro. Jac. 168. *Bolls v. Winston*, Noy, 122. *Gilb. Uses*, 138.

(b) *Smith v. Warren*, Cro. Eliz. 688.

(c) *Ante*, c. 5.

48. In a note to a passage in Viner's Abridgment, by the late Mr. Sergeant Hill, which has been published by Mr. Sugden, he states his opinion, that where a future contingent use was not limited in remainder after a particular estate, but as a springing \* use after a fee, there no act done by him, who \* 282 had the base or qualified fee, would destroy it, except in the case of a covenant to stand seised to future uses. (a)

49. The doctrine that contingent uses are supported by a *scintilla juris*, or possibility of entry in the original feoffees, releasees, &c., stands only upon the authority of an extrajudicial opinion of a majority of the Judges in Chudleigh's case. It is very strongly combated by Lord Chief Justice Pollexfen, who makes the following observations on the great inconveniences that would follow from its admission: (b)

50. "If it should now remain in the power of these conusees, feoffees, or covenantors, and their heirs by their fine, feoffment, or any other act, to destroy all those contingent remainders, what room and place will there then be for confederacies and contrivances; and the estates of most of the families in England, in respect to their issues and posterity, be put into danger, and into the will and power of strangers and mean persons; such as feoffees and conusees, and their heirs, commonly are.

"How unsafe will it be for any man to meddle with these estates; for it must not only be inquired, what acts have been done by those that had the particular estates, and were esteemed as the owners of the land, and whether these particular estates continued in being till the contingent estates came *in esse*; but it must also be known whether the conusees or feoffees, or their heirs, have done no act before those remainders came *in esse*, whereby these remainders should be destroyed.

"How dangerous will this be to all farmers and tenants that take leases under provisos and powers of making leases, which are common in all settlements; for if the conusees or feoffees or their heirs, have done any such act, all their leases and estates will be void: for if there remains any estate or interest in the conusees or feoffees, which must continue in them to supply the uses appointed and declared by these leases, then that estate or interest being defeated, those leases must all be naught." (c)

(a) Gilb. Uses, 3d edit. 288.

(b) *Ante*, c. 5.

(c) *Hales v. Risley*, Pollexf. 383.

51. In the Treatise of Equity is the following passage, which is taken from the subsequent part of Lord Chief Justice Pollexfen's argument in the case above cited:

"It was formerly held that the feoffees, after the statute, had a possibility to serve a future use, when it came *in esse*; 283 \* and that \*they should be reputed the donors of all the contingent estates, when they vested; and if the possession was disturbed, the feoffees should have power to re-enter, to revive the future uses, according to their trust; but if they bar themselves of their entry, then this case, not being remedied by the statute, remains at common law. But this opinion has been since contradicted; and it is now held that, to the raising of the future uses after the statute, the regress of the feoffees is not requisite, and that they have no power to bar these future uses: for the statute has taken and transferred all the estate out of them, and they are as mere instruments; so that contingent uses do now, like other contingent remainders, depend upon the particular estate. For to reduce the estates, conveyed by way of use to the common law, which all sides agree was the chief end of the Statute of Uses, nothing ought to be left in the feoffees, no need of any *scintilla juris*, or power of reëntry, for the benefit of the contingent uses, nor power in the feoffees to destroy them; but they are mere conduit pipes. And the other conceit was grounded, as it seems, upon a zeal against perpetuities and contingent remainders, there being at that time no received opinion that the destruction of a particular estate would destroy a contingent remainder, till afterwards in Archer's case it was so adjudged." (a)

52. To these authorities may be added that of the late Mr. Fearne, who appears to have fully concurred in opinion with Lord Chief Justice Pollexfen as to the dangerous consequences that would follow from the fiction of a *scintilla juris* in the feoffees or releasees; and who therefore contends that, as the Statute of Uses expressly enacts, that where any person, &c., is seised to the use of others, such other persons shall be deemed and adjudged in lawful seisin, estate, and possession, &c., to all intents, constructions, and purposes in the law, of and in such like estates as they had in the use, &c. And must not these words, *to all*

(a) Treatise of Equity, B. 2, c. 6, § 1. *Ante*, § 4.

*intents, constructions, and purposes in the law*, be referred to the legal properties, qualities, and capacities of estates of the like degree or measure at common law? If so, the *cestuis que use* become entitled to, and take by virtue of this statute, estates possessing and bearing in themselves all the qualities, properties, and capacities of estates at common law, of the like degree or measure. Now, one of the legal qualities or capacities of an estate at common law of the degree or measure of freehold is, that after it is divested and turned to a right of entry, such right of entry will support a contingent remainder; and one of the qualities or capacities of a contingent remainder at common law is, a capacity of being supported by such right of entry. Why then do not a preceding vested use, of the degree or measure of freehold, and a subsequent contingent use, respectively, acquire these legal qualities, properties, or capacities, amongst other qualities or properties of estates of like nature and degree at common law? If they do, it is obvious there can be no necessity for any actual entry by any body to restore a contingent use, where there subsists a right of entry in a *cestui que use* of a preceding vested freehold to support it; but such right of entry alone will preserve its capacity of vesting and taking effect. If we deny this, we at the same time deny that the *cestuis que use* have lawful seisin, estate, and possession, &c., to all intents, constructions, and purposes in the law of such estate, as they have in the use. (a) <sup>1</sup>

(b) Fearn, Cont. Rem. 300. See also Sugd. Pow. c. 1, § 3.

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<sup>1</sup> This opinion of Mr. Fearn, that there is no necessity of an actual entry, in order to regain the seisin requisite to serve a contingent use, any more than in the case of a contingent remainder, has the full concurrence of Chancellor Kent; who holds that the consideration paid by the tenant for life, ought, in good sense, to enure to sustain the deed through all its limitations, in like manner as a promise to B, for the benefit of C, will enure to the benefit of the latter, and give him a right of action. He quotes, with entire approbation, the opinion of Mr. Sugden, that the sound construction of the Statute of Uses requires that limitations to uses should be construed in like manner as limitations at common law; and that the statute divests the estate of the feoffees, and the estates limited prior to the contingent uses take effect as legal estates, and the contingent uses take effect as they arise, by force of the original seisin of the feoffees; the vested estates being subject to open and let in these uses. See 4 Kent, Comm. 243—246; Sugd. on Pow. ch. 1, § 3. In *New York*, and as it seems, in *Delaware*, also, uses are abolished, and the interest of the *cestui que use* is turned into a legal estate. See *ante*, tit. 11, ch. 3, § 3, note.

## CHAP. VII.

## TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

SECT. 1. *Invention of.*6. *A Conveyance by them is a Breach of Trust.*8. *Sometimes not punished for destroying Contingent Remainders.*SECT. 11. *Sometimes directed to join in destroying them.*16. *In other Cases such Direction refused.*25. *Bound to preserve the Timber, &c.*

SECTION 1. Contingent remainders being liable to be defeated by the alienation or forfeiture of the tenant for life, and also by the various acts before mentioned; a mode of preventing this inconvenience was invented, by limiting an estate to trustees and their heirs, to commence from the determination of the particular estate, by forfeiture or otherwise, in the lifetime of the tenant for life, and to continue during the life of the tenant for life, upon trust to support the contingent remainders after limited from being defeated or destroyed; by which means, if the tenant for life should alien or forfeit his estate, or if it should be merged or destroyed by any other means, the trustees, having a vested remainder, immediately acquire a right of entry, which, as has been shown, is sufficient to support the contingent remainders. (a)<sup>1</sup>

2. This improvement is generally attributed to Sir Orlando Bridgeman and Sir Geoffrey Palmer, who retired from the bar during the civil wars, and confined themselves to conveyancing. When, after the restoration, these persons came to fill the first

(a) *Ante*, c. 1.

<sup>1</sup> The necessity of trustees to preserve contingent remainders, in the case of posthumous children, is expressly taken away by the statutes of *Georgia*, Rev. St. 1845, p. 332, 333, ch. 12, art. 3.; *South Carolina*, Vol. II. p. 542; *Delaware*, Rev. St. 1829, p. 314; *New York*, Vol. II. p. 11, § 34, 3d ed.; *Illinois*, Rev. St. 1839, p. 157; *Kentucky*, Vol. I. p. 443, § 11; and *Mississippi*, Rev. St. 1840, p. 349, § 27. It is also taken away by the operation of the statutes of several other States. [See *Webster v. Cooper*, 14 How. U. S. 488.]

offices in the law, they supported this invention within reasonable and proper bounds; and thus it was introduced into general use. (a)

3. A limitation of this kind is as necessary where contingent remainders are created by way of use, as where they are limited \*by a common-law conveyance: for if the uses \*286 are divested, we have seen that an actual entry by the feoffees or releasees to uses, or by some person having a preceding vested estate, is deemed necessary to revest the contingent uses. And though that doctrine appears very doubtful, yet it is quite clear that a right of entry is necessary in those cases. (b)

4. It should, however, be observed, that where an estate is limited in a bargain and sale, or covenant to stand seised, to a stranger, upon trust to preserve contingent remainders, that limitation will be void; because no use will arise under these conveyances without a consideration. (c)

5. Where the legal estate is vested in trustees, and the contingent limitations are only trusts, there is no necessity to limit an estate to trustees to preserve the contingent estates. It is the same in the case of copyholds, for the estate of the lord will preserve contingent remainders against forfeiture. (d)

6. It was declared by Lord Keeper Harcourt, that where there were trustees appointed by will to preserve contingent remainders to unborn sons, and they before the birth of a son joined in a conveyance to destroy the remainders, this was a plain breach of trust; that any person taking under such conveyance, if voluntarily or with notice, should be liable to the same trusts. It was objected that this had been only *obiter* said in equity, and that there never was any precedent of a decree in such a case: but Lord Harcourt said it was very plain and reasonable; and that if there was no precedent in this case, he would make one. (e)

7. A person devised lands to trustees and their heirs, to the use of his sister for life, remainder to the same trustees and their heirs during the life of his sister, to preserve contingent remainders, remainder to the use of the first and other sons of his sister in tail male, remainder over in fee. Upon the death of the testator, his sister entered and married; she and her husband then joined with the remainder-man in fee in a feoffment and

(a) 2 Bl. Comm: 172.

(b) *Vide Doe v. Heneage, ante, c. 5.*

(c) Tit. 32, c. 9 & 10.

(d) *Ante, c. 6, § 9.* 2 Ves. Jun. 209.

(e) *Pye v. Gorge, 1 P. Wms. 128.*

fine to trustees, to the use of the husband and his heirs. Some time after, the trustees conveyed the estate by lease and release to the husband of the devisee for life in fee, his wife being at that time *ensient* with a son. A bill was filed by that son, after the death of his mother, to have the benefit of the will of his uncle.

287 \* \* It was resolved by Lord King, assisted by Lord Chief Justice Raymond and Chief Baron Reynolds:—

First. That the feoffment and fine by the devisee for life and her husband did not destroy the contingent remainders to the first and other sons; but that the right to the freehold in the trustees supported them.

Secondly. That when the trustees joined in the lease and release to the husband of the devisee, for life and his heirs, this destroyed the contingent remainders.

Thirdly. That the joining of the trustees to destroy such remainders was a plain breach of trust; and though this had not been before judicially determined, yet it seemed to the Court, in common sense, reason, and justice, to be capable of no other construction. For when trustees are appointed to preserve an estate in a family, and for no other purpose, and they, instead of preserving it, do a wilful act with an intent and in order to destroy it;—how can this be otherwise than a plain breach of trust, or how can it be rendered clearer than by barely putting the case?

Should the Court hold it to be no breach of trust, or pass it by with impunity, it would be making proclamation that the trustees in all the great settlements in England, were at liberty to destroy what they had been entrusted only to preserve.

As to the remedy,—had the premises been conveyed to one without notice, and for a valuable consideration, such purchaser must have held the lands discharged of the trust; and the son of the marriage, who was injured by the breach of trust, have taken his remedy against the trustees only; who would have been decreed to purchase lands, with their own money, equal in value to the lands sold, and to hold them upon the same trusts and limitations as they held those sold by them. But even in case of a purchase, if the purchaser had notice of the trust which the trustees were subject to, as annexed to their estate, such notice



would have made him liable to the same trust. So, if there had been a voluntary conveyance made of this estate, though without notice, the voluntary grantee would have stood in the place of the grantors, and have been liable to the trust in the same manner as the trustees themselves were. But in the present case it was much stronger, for here was not only notice of the trust, but the conveyance itself voluntary, and made to the husband \*of the tenant for life; so that the lands \*288 conveyed by these trustees must remain liable to the same trusts as they were when the trustees joined in the conveyance. (a)

8. There have been *some cases* where a court of equity has *refused to punish trustees for joining in a conveyance to destroy contingent remainders*; as where, upon a subsequent remainder to the right heirs, a collateral relation only has been affected by it, there having been no issue of the marriage. For, next after the parties to the marriage, the Court considers the issue to be the only objects of the settlement and trusts, and pays less regard to the remainder over to the right heirs, as no immediate objects of the consideration in the settlement; as also where the application to the Court for relief has been made by one who was not at the time, nor possibly ever might be, entitled to the remainder under the words of the limitation. (b)

9. Thus, where a settlement was made in consideration of a marriage and £3000 fortune, and for settling the lands in question in the name and blood of the husband; and the lands were limited to trustees in trust for the intended husband for ninety-nine years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the first and other sons of that marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband. The marriage took effect; the husband and wife, and trustees to support, &c. by fine and conveyance, settled the lands on the husband for ninety-nine years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the wife for her jointure, remainder to the first and other sons of the marriage, remainder over to several

(a) *Mansell v. Mansell*, 2 P. Wms. 678. *Forrest*, R. 252. *Pearce v. Newlyn*, 3 Madd. 186.

(b) *Fearne*, Cont. Rem. 328.

other persons. The husband and wife died without leaving any issue. The plaintiff, being heir at law to the husband, brought his bill to set aside the second conveyance by the trustees, as being made in breach of their trust; and insisted that they were trustees, as well for the support of this remainder, as of the remainder to the first and other sons; all being contingent remainders; that such conveyances ought to be set aside, as had been the practice of the Court.

Lord Harcourt held it to be so, as to the first and other  
289\* sons, \* who came in and were to be considered as purchasers under the marriage settlement and portion; and said it would be dangerous for any trustees to make the experiment, for that it was most certainly a breach of trust; and if it should ever come in question, he thought the Court would set aside such a conveyance; not but that, he said, the case might possibly be so circumstanced, as that the Court could not relieve against it. But where relief was to be given in such case, it was only to those who came in and claimed as purchasers, as the first and other sons; but all the remainders after to the heirs of the body of the husband, and to his right heirs, were merely voluntary, and not to be aided in equity. The bill was dismissed. (a)

10. A made a feoffment to the use of himself for ninety-nine years, if he so long lived, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the use of the heirs of his body, remainder to himself in fee. A having two sons, he and the trustees, together with the eldest son, joined in a feoffment and fine to B in fee, as a security for a sum of money. The eldest son died without issue; the second brought a bill to set aside the feoffment and fine.

Lord Cowper said, this was plainly a contingent remainder, being limited to the heirs of the body of A, who could have no heir during his life; and it was plain that the feoffment did, at law, destroy the contingent remainder, the trustees, who had the freehold, having joined. But it might be a question whether this was a breach of trust in the trustees. It was true, if the eldest son joined in a feoffment, where the remainder in tail was limited to him, it prevented any breach of trust in the trustees. But here the limitation being to the heirs of the body of

(a) *Tipping v. Pigot*, 1 Ab. Eq. 385.

A, who could not have an heir of his body during his own life ; the joining of the eldest son was not in this case so material ; yet it seemed hard when the heir apparent joined, in a case where it would be no breach of trust, if the limitation were to the eldest son, that it should be a breach of trust in respect to the limitation to the heir. But the trustees, appointed to preserve the contingent remainders, ought not to join in destroying those remainders, which would be acting the reverse of their trust. He was, however, of opinion, that the second son, though he had survived the eldest, had no right to a bill in his father's lifetime ; for he neither was, nor possibly ever would be, the \* heir of his father, unless he survived his father, which \* 290 was uncertain. (a)

11. There are also *some instances* of a court of equity, exercising a discretionary power of *directing trustees* for preserving contingent remainders *to join with the tenant for life*, or his first son, *in barring the subsequent contingent limitations*. This, however, has only happened under peculiar circumstances, either of pressure to discharge incumbrances prior to the settlement, or in favor of creditors, where the settlement was voluntary ; or for the advantage of the persons who were the first objects of the settlement, as to enable the eldest son to make a settlement upon an advantageous marriage. (b).

12. The defendant, Richard Sprigg, (c) made a mortgage of the lands in question for the term of 1000 years, to secure £1000, and also confessed a judgment for £150. Afterwards, upon his marriage, he settled the same lands to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to his wife for life, remainder to his first and other sons in tail, remainder to his own right heirs. There being no issue of the marriage, Sprigg articted to sell the lands to the plaintiff, who brought his bill setting out these facts ; and that the trustees refused to join, and the mortgagee threatened to enter ; praying a specific execution of the agreement, and that the trustees might join in conveyances.

Sprigg and his wife, by their answer, set out the settlement, that they had been married six years, and had no issue ; confessed the contract with the plaintiff, and that they were willing

(a) *Else v. Osborne*, 1 P. Wms. 387. 2 P. Wms. 688.

(b) *Fearne*, Cont. Rem. 331.

(c) *Platt v. Sprigg*, 2 Vern. 803.

to perform it. The trustees set out the marriage settlement, and that they were willing to do what the Court should direct, being indemnified.

For the plaintiff it was insisted that the settlement being only of an equity of redemption, the mortgagee was not bound thereby, but might enter and foreclose; which would bind, though there should be issue afterwards born; and the husband, not being able to redeem, a sale was absolutely necessary, otherwise the benefit of redemption would be lost, as well to the husband and wife, as to the issue, in case there should be any.

The Master of the Rolls (Sir J. Trevor) decreed the trustees to join, and to be indemnified, the settlement being only  
291 \* of an equity \* of redemption; the wife being in court, and examined whether she freely consented thereto or not.

13. J. S., by marriage settlement, was tenant for ninety-nine years, if he should so long live, remainder to trustees and their heirs during his life, to support contingent remainders; remainder to his first and other sons in tail male; remainder to trustees for five hundred years, in trust, to raise portions for daughters, if there were no issue male. J. S. had issue a son, who being of age, and about to marry, he and his father brought a bill to have the trustees to join in making an estate, in order to suffer a common recovery, that he might be enabled to make a settlement on his marriage.

It was urged, that the trustees were only trustees for the son, and ought to execute estates as he should direct, he having the inheritance in him; and that the end of the trust was to hinder the father from defeating the son of the estate. On the other side it was said that these trustees were not only trustees for the eldest son, but were designed as a guard for the whole settlement; that the mother being living, there might be other children; and for the trustees to join would be a breach of trust. There being a daughter in this case, Lord Harcourt directed that, upon giving security for the daughter's portion, the trustees should join in the recovery. (a)

14. A person after marriage, made a voluntary settlement to himself for life; remainder to trustees, to support contingent remainders; remainder to his first and other sons in tail; remainder to himself in fee. He afterwards made a conveyance of his

(a) *Frewin v. Charlton*, 1 Ab. Eq. 886.

estate to other trustees, for payment of his debts. The creditors brought their bill; and *inter alia* insisted that the trustees for preserving contingent remainders should join in a sale, to destroy the contingent remainders.

The cause came on by consent, before Sir Joseph Jekyll, who took time to consider of it; alleging, that though in the case of Sir Thomas Tipping, where trustees had joined in cutting off remainders, created by a voluntary settlement, the Court, on a bill brought by a remote relation, had refused to punish them, as distinguishing between a voluntary settlement and one made on a valuable consideration; yet he had not known a precedent \* where the Court ever decreed the trustees to \* 292 join in destroying the contingent remainders, this being the reverse of the purpose for which they were at first instituted. (a)

15. Upon the marriage of the plaintiff, Mr. Winnington, who was the eldest son of Sir Francis Winnington, the family estate was settled upon the plaintiff for ninety-nine years, if he should so long live, remainder to trustees during his life, remainder to the first and other sons of that marriage in tail male, remainder to the first and other sons of any other marriage, remainder over. Mr. Winnington had, by his lady, who was then dead, one son of age, and for whose marriage he was in treaty. The surviving trustee for preserving contingent remainders being dead, leaving an infant heir, Mr. W. and his son brought a bill against him, praying that he might be directed to join in making a tenant to the *præcipe*, in order to a common recovery for making a settlement on the son's marriage.

On the hearing, Lord Parker declared that the trustee being appointed to preserve contingent remainders, and here being a vested remainder in tail, if this were for the good of the family, he did not see but such trustee might lawfully join; and referred it to the Master to state whether this was for the good of the family.

The Master reported that the son was in treaty for the marriage above mentioned; that it was a beneficial marriage for the family; and that it was necessary a new settlement should be made of the estate, which could not be done without a recovery.

(a) *Bassett v. Clapham*, 1 P. Wms. 358. *Ante*, § 9.

Lord Parker said, it might be greatly mischievous to a family if such a trustee should stand out, and not join with the father and son in cutting off the old settlement, and making a new one. This was plainly for the benefit of the family; for by the intended settlement, the son was to be but tenant for life, instead of tenant in tail, so that it was a means of preserving the estate longer in the family. Also the wife of Mr. Winnington, the father, being dead, there was an end of the contingent remainders by that marriage; as to any remainders by another marriage, no remainder not *in esse* ought to be so much regarded as the remainder in tail, which was actually vested in Mr. Winnington, the son. He, therefore, directed that the trustee should  
 293\* join with \*the father and son, in order to make a new settlement; and that the Master should direct a proper conveyance, in which the trustee should join. (a)

16. But, however, the Court of Chancery may judge it proper to direct trustees to concur in destroying contingent remainders, under circumstances like those in the above cases; yet it has *repeatedly denied* the same interposition in cases where such ingredients were wanting.

17. By a marriage settlement, lands were limited to the husband and wife for life, remainder to trustees to preserve contingent remainders, remainder to their first and other sons in tail male. The husband and wife having been married twelve years, and no issue, and the husband being in debt, they brought a bill, praying that they might be enabled to sell part of the lands for the payment of them; to which the trustee consented, provided he might be indemnified.

\* Though it was urged that there were precedents of like cases, yet Lord Keeper North refused to make any such decree; saying, he had known people married near twenty years without issue, who after had children. (b)

18. By a settlement on the marriage of the defendant, John Lawton, senior, lands were limited to his use for ninety-nine years, if he should so long live, remainder to trustees, of which Mr. Montague was the survivor, for the life of John Lawton, senior, to preserve contingent remainders, remainder to his wife for life, remainder to the first and other sons of the marriage in

(a) *Winnington v. Foley*, 1 P. Wms. 536.

(b) *Davies v. Weld*, 1 Ab. Eq. 386.

tail male, remainder over. The wife was dead; and the defendants, Edward and John Lawton, were the only issue of the marriage. John Lawton, the father, having mortgaged the premises to the plaintiff, and Edward Lawton, the son, being come of age, the father and son entered into articles with the plaintiff, and thereby covenanted that they would suffer a recovery, and procure Mr. Montague, the surviving trustee, to join therein. But Mr. Montague refusing, the plaintiff brought his bill to compel a specific performance of the covenant, and that Mr. Montague might join in suffering the recovery.

Lord King asked if the younger brother would consent that the trustees should join. Being told that he refused, he said he would not decree the trustee to join; for that he would not take away any man's right. It was insisted that \*294 the same was done in the case of *Winnington v. Foley*, to which he said he would also do so, were the like case to come before him; in that case, the trustee was decreed to join, in order to preserve the estate in the family; but in the principal case they would have the same done with a view only to alien. The bill was dismissed. (a)

19. A bill was brought to compel trustees to join in a sale, which would destroy the contingent remainders in a settlement, the limitations of which were to the husband for ninety-nine years, if he so long lived, remainder to the wife for her life, remainder to trustees to preserve contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the husband. And the first declaration under it was, that it was the intention of the settlement to make a provision for the children of the marriage.

Lord Hardwicke said, there were many cases in which the Court would compel trustees to join in such a conveyance as would destroy contingent remainders; but then it must be in some measure to answer the uses originally intended by the settlement; and had been usually done in the case of old settlements only, as in *Winnington v. Foley*. But he believed there was no instance where they had compelled such trustees to join with a father, termor for ninety-nine years, and his son, to sell the estate. (b)

(a) *Townsend v. Lawton*, 2 P. Wms. 379. *Ante*, § 15.

(b) *Symman v. Tattam*, 1 Atk. 613. *Ante*, § 15.

20. Sir John Hoskins devised his real estate to his eldest son, Bennett Hoskins, for ninety-nine years, if he should so long live, remainder to trustees during the life of Bennett, to preserve contingent remainders, remainder to the first and other sons of Bennett in tail male, remainder to the testator's second son, Hungerford Hoskins, for ninety-nine years, if he should so long live, remainder to trustees during the life of Hungerford, to preserve contingent remainders, remainder to his first and other sons in tail male, with like remainders to his younger sons, remainder to his own right heirs; and the testator empowered his sons to revoke the uses limited by his will, and to appoint new uses, provided they limited the same to their sons for ninety-nine years, and in strict settlement; with several other powers and directions for the effectuating his intention of preserving the estate in his family. Bennett Hoskins died without issue; the defendant, Sir Hungerford \* Hoskins, coming into possession of the estate, had issue an only son, Chandos Hoskins, who had attained his age of twenty-one; and borrowed several sums of money from the plaintiffs, for which he and his son became bound. Soon after the son's being thus bound for his father, articles were entered into between Sir Hungerford and Chandos Hoskins on the one part, and the plaintiffs on the other, whereby, after reciting the debts, and that Chandos was bound for the payment of them, as surety for his father, Sir Hungerford and Chandos covenanted with the plaintiffs to convey the estate in question to them and their heirs, upon trust, to sell the same, and apply the money to the payment of their debts, and to pay the surplus thereof to Sir Hungerford. The bill was brought against Sir Hungerford and Chandos for a specific performance of the articles, and likewise against the heir of the surviving trustee for preserving contingent remainders; that he should join in a conveyance for making a tenant to the *præcipe*, in order to the suffering a recovery; and also to have the power of revocation declared void as to all the remainder-men under the will of Sir John Hoskins.

Lord Hardwicke. "Had this case depended upon the power of revocation, I should not have determined it without the assistance of the Judges; but the previous point is, whether the Court will compel the trustees to join in enabling the father and son to suffer a recovery. Indeed, thus much use may be made of the



power of revocation, that it plainly shows Sir John Hoskins intended to make as strict a settlement as he could, and to preserve the estate in his name and blood as long as he was able; and where clauses of this nature, tending to perpetuities, have been inserted in deeds or wills, it has been a prevailing motive with the Court to supply defects in other parts of the deeds or wills; and to make as strict a settlement as possible; as was done by Lord Cowper in *Stamford* and Sir J. Hobart's case *(a)* upon Serjeant Maynard's will, where trustees to preserve contingent remainders were inserted by the Court.

"It has been admitted in the present case, that there is no precedent for such a decree as is prayed by the bill; and I do not think the present case such as will warrant me in making one. Trustees of this kind have often been called honorary trustees, *i. e.* that such a trust is reposed in them as they may exercise \* at discretion; and that, therefore, the Court \* 296 ought not to consider them as guilty of a breach of trust for such exercise of their discretion. But since the case of *Mansell v. Mansell*, *(b)* where it was determined to be a breach of trust, and to affect a purchaser with notice, that notion has been laid aside. I will not say that the Court would decree the trustees joining in such a case as the present to make a tenant to the *præcipe*, a breach of trust in them; that being a quite different question.

"It has been said that this kind of settlement, where the father is made but tenant for years, is very inconvenient, and tends to perpetuities; but I do not know that this doctrine has been ever laid down by the Court. To some public purposes these settlements may be inconvenient; however, they were formerly very common, and no objection made to the propriety of them. Now what was the reason of such a limitation? Most certainly to preserve the estate longer from alienation than if the father was made tenant for life; because in this last case the father and son might pass by the trustees, and suffer a recovery without them; and therefore the estate was limited for years, to prevent that consequence; and also for that the son being greatly under the father's power for his maintenance, the father might distress and force him to join in selling the estate, where the freehold is in the father; whereas by vesting the freehold in

(a) 3 Bro. Parl. Ca. 31.

(b) *Ante*, § 7.

trustees, that consequence is likewise avoided. Now the occasion for suffering a recovery in the present case, is considerable. It is not for the making any marriage settlement, nor upon account of any particular misfortune in the family, nor for payment of the son's debts, but for payment of the father's; the son being only a surety for the father, and entering into bond but just before the making of the articles; and it is very probable the estate was settled in this manner by Sir John Hoskins to guard against the very event of the son's being drawn into a sale of the estate for payment of the father's debts. It has been said that the son, as tenant in tail, is owner of the estate, and that it is not necessary to make the subsequent remainder-man party to bills relating to his estate. But where a man is only tenant in tail in remainder, and has not the freehold in him, I do not think he is to be considered as owner; and in all cases the owner of the freehold must be before the Court.

“The precedents of decreeing trustees to join in suffering  
297\*    ing \*recoveries are not many, and have not gone so far as the present case. In that of Mr. Winnington, (a) the end was the making a marriage settlement, which was carrying on the donor's intention, and not to put the estate out of the family. It was objected, that the trustees joining with the father would be no breach of trust in them, and that the Court would not decree them to make satisfaction, nor affect a purchaser with the trust; and that therefore what is prayed by the plaintiff's bill should be decreed; but there is a medium between the two propositions, for the Court will not always decree a man to do what would not possibly be a breach of trust in him if he did it. The reasons and motives of a trustee's joining would be considered in determining whether he was or was not guilty of a breach of trust. But as the trust in question was most probably created to prevent the father and son from selling or disposing of the estate, as soon as he came of age, the decreeing the trustees to join in suffering a recovery would be decreeing them to act directly contrary to their trust.” The bill was dismissed. (b)

21. Francis Barnard devised freehold and copyhold estates to T. C. Barnard for ninety-nine years, if he should so long live, remainder to the defendant Large during the life of T. C. Bar-

(a) *Ante*, § 15.

(b) *Woodhouse v. Hoskins*, MSS. Rep. 3 Atk. 22.

nard, in trust to preserve contingent remainders, remainder to the first and other sons of T. C. Barnard in tail male, remainder to J. Wall in fee. T. C. Barnard had issue only one son, who attained twenty-one years, the father and son filed a bill against Large the trustee, and Wall the remainder-man, stating that they were desirous of suffering a recovery, and of limiting the estate so as to preserve the contingent remainders to the second and other sons of T. C. Barnard; and praying that Large the trustee, might be decreed to join in making a tenant to the *præcipe* for that purpose; submitting to declare the uses of the recovery to the second and other sons of T. C. Barnard, by way of contingent remainders, as limited by the will; and to limit an estate to a trustee, for the purpose of supporting and preserving those contingent remainders.

Sir T. Sewell, M. R., observed, that with respect to remainders to remote relations in settlements, where the persons to whom they were limited were not the immediate objects of the parties, or where they stand in opposition to the first tenant in \*tail; desiring a reasonable benefit, consistent \*298 with the intentions of the creator of the limitations, their pretensions had not been much considered; but in the present case all took as volunteers, and were all equally to be attended to. He then considered the several cases on this subject, and said that, from a review of them all, it seemed that when the eldest son, tenant in tail, is of age, and about to marry, and thereby continue, instead of destroying the purposes of the settlement, and in some cases where there has been particular distress, under particular circumstances, which ought to have induced the trustee to join, the Court had interfered; otherwise not. That in the principal case he was called upon to disturb the testator's disposition, merely for the sake of disturbing it; for which he saw no reason; and dismissed the bill with costs. (a)

22. It is observable that in the two last cited cases, a *distinction* was made *between punishing trustees for joining to destroy contingent remainders, and compelling them to join.* This distinction seems to flow from the supposing any discretion at all in the trustees; because there may be circumstances sufficient to justify, though short of an obligatory call for such an exercise of

(a) Barnard v. Large, Amb. 774. 2 P. Wms. 684, note. (Osborne v. Bury, 1 B. & Beat. 58.)

their discretion. And Mr. Fearne has observed, that however this may be, it seemed the safest way for trustees not to act, except in the clearest cases, without the direction of the Court of Chancery; and recommends to their discretion the words of Lord Harcourt in *Pye v. Gorge*, "That it would be a dangerous experiment for trustees in any case to destroy remainders, which they were appointed by the settlement to preserve." (a)

23. In the following modern case it was held that trustees, to preserve contingent remainders, joining in a recovery, was not a breach of trust.

24. Upon a bill for the specific performance of a contract for the sale of an estate, an objection was taken to the Master's report approving of the title.

The abstract stated indentures of lease and release in 1693, previous to the marriage of William Levinz and Anne Buck, by which Sir Creswell Levinz, and William Levinz, his son and heir apparent, conveyed to trustees and their heirs, to the use of William Levinz for ninety-nine years, if he so long lived, with remainder to trustees and their heirs, for the life of 299 \* William \* Levinz, in trust to preserve contingent remainders; remainder to the first and other sons of the marriage in tail male; remainder in case William Levinz should die without leaving any issue male then born and alive, and leaving his wife with child, to such after-born child or children, if a son or sons; remainder to William Levinz, brother of Sir Creswell Levinz, for one hundred and twenty years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to Sir Creswell in fee. The issue of the marriage was one son, William Levinz, who attained the age of twenty-one in 1734, and three daughters, one of whom died unmarried.

The abstract further stated that, by indentures of bargain and sale in 1734, William Levinz and his son, and the heir of the surviving trustee for preserving contingent remainders, conveyed to a tenant to the *præcipe*, for the purpose of suffering a recovery, to enure to the use of William Levinz the father, for life, remainder to the son in tail general, remainder to the right heirs of the father; with power to the father and son jointly, or

to the survivor, to revoke the uses, and to sell or declare new uses.

The plaintiff was seised in fee under conveyances and devises derived from this title. The objection was, that the heir at law of the surviving trustee for preserving contingent remainders in the settlement of 1693, had been guilty of a breach of trust in joining with William Levinz the father and his son, in the deed of 1734, for making a tenant to the *præcipe*, for suffering a recovery of the estate, and thereby destroying the remainders, unless the plaintiff could show that William Levinz the younger, was dead without issue; and also that there was a failure of issue male of William Levinz, the nephew of Sir Creswell; and also that Sir Creswell did not by his will dispose of the reversion in fee.

Lord Eldon said, it was agreed on all sides that a good legal title to the estate could be made. The question was, whether, under the circumstances, that title, good at law, would also be a good equitable title; or, putting it in another shape, whether there was in the year 1734 such a breach of trust committed, in the execution of the conveyance of that date, that supposing any person descended from the son of William Levinz, that person could now, allowing for all incapacities of infancy or otherwise, \* claim under the instrument executed in the \* 300 preceding century; and insist in this Court that there was that sort of breach of trust upon which he could say that the equitable estate belonged to him, however good the legal title might be in the vendor. (And he was of opinion that there was no such breach of trust.) (a)<sup>1</sup>

(a) *Moody v. Walters*, 16 Ves. 283.

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<sup>1</sup> "It is not a little difficult," said Mr. Justice Story, "to ascertain from the authorities the true nature and extent of the duties and liabilities of trustees to preserve contingent remainders; and in what cases they may or ought to join in conveyances to destroy them, or not. Lord Eldon has expressed himself unable to deduce the true principle from them. His language is: 'The cases are uniform to this extent; that if trustees, before the first tenant in tail is of age, join in destroying the remainders, they are liable for a breach of trust; and so is every purchaser under them with notice. But, when we come to the situation of trustees to preserve remainders, who have joined in a recovery after the first tenant in tail is of age, it is difficult to say more, than that no Judge in equity has gone the length of holding, that he would punish them, as for a breach of trust; even in a case, where they would not have been directed to join. The result is, that they seem to have laid down, as the safest rule for trustees, but certainly

301\*      \* 25. Trustees to preserve contingent remainders are not only *bound* to preserve all the limitations created by the settlement; but also to *protect the inheritance*, and to *keep it as entire as possible*. Now, as the inheritance consists of land, timber, mines, &c., all these are under the protection of the trustees; and in the execution of this trust, they are entitled to every assistance which a court of equity can afford them. And where there is a limitation to trustees to preserve contingent remainders, the Court of Chancery will not permit a tenant for ninety-  
 302\*      nine years, \* if he shall so long live, to join with the person entitled to the inheritance for the time being, to cut down timber. This doctrine was laid down by Lord Hardwicke, in the following case lately published from his own manuscripts. (a)<sup>1</sup>

26. Richard Bovey Garth, being tenant for ninety-nine years, if he should so long live, without impeachment of waste, voluntary waste excepted, with remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail male, with the ultimate remainder to Sir John Hind Cotton in fee, and, having no children, he entered into an agreement with Sir John Hind Cotton for cutting down part of the timber then standing on the estate, the money to arise from such timber to be divided between Bovey and Sir J. H. Cotton.

A quantity of timber was felled in consequence of this agreement, and Sir J. H. Cotton received a part of the money.

Some years after Bovey had a son, who, after the death of his

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(a) See 2 Swanst. 144, and note (a)

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most inconvenient for the general interests of mankind, that it is better for the trustees never to destroy the remainders, even if the tenant in tail concurs, without the direction of the Court. The next consideration is, in what cases the Court will direct them to join. And, if I am governed by what my predecessors have done, and refused to do, I cannot collect, in what cases trustees would or would not be directed to join; as it requires more abilities than I possess, to reconcile the different cases with reference to that question. They all, however, agree, that these trustees are honorary trustees; that they cannot be compelled to join; and all the Judges protect themselves from saying, that if they had joined, they should be punished; always assuming that the tenant in tail must be twenty-one.” 2 Story, Eq. Jur. § 997; *Biscoe v. Perkins*, 1 V. & B. 491, 492.

<sup>1</sup> His judgment is a very learned dissertation upon the subject, and was therefore printed at large by Mr. Cruise; but it is deemed not to be of sufficient importance to American lawyers to warrant its insertion entire, in this edition.

father, suffered a recovery ; and filed his bill against [the representatives of] Sir J. H. Cotton, praying a satisfaction for so much as he had received of the money which arose from the sale of the timber.

Lord Hardwicke observed, that upon this case the general question was, whether the plaintiff was entitled to satisfaction for so much as Sir J. H. Cotton received out of the inheritance by the fall and sale of timber, before the plaintiff came *in esse*, and, consequently, before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency or possibility. And he was of opinion that he was ; and accordingly decreed satisfaction to the plaintiff for what the late Sir J. H. Cotton received out of his assets. (*a*)

(*a*) *Garth v. Sir J. Cotton*, Dickens, 183.

## CHAP. VIII.

## OTHER MATTERS RELATING TO REMAINDERS.

SECT. 1. <i>Where Contingent Remainders are limited, the Inheritance remains in the Grantor.</i>	SECT. 14. <i>Contingent Remainders are transmissible.</i>
12. <i>How far this Doctrine is applicable to Common-Law Conveyances.</i>	18. <i>Exception to this Rule.</i>
	20. <i>A Contingent Remainder may pass by Estoppel.</i>
	22. <i>May be assigned in Equity.</i>
	23. <i>And devised by Will.</i>

SECTION 1. Where a remainder of inheritance is *limited in contingency, by way of use, the inheritance*, in the mean time, if not otherwise disposed of, *remains in the settlor or grantor, until the contingency happens*, to take it out of him.

2. Thus, in Sir E. Clere's case, it was resolved by Popham, Chief Justice, and Baron Clarke, upon conference had with the other Justices, that—"If a man seised of lands in fee makes a feoffment to the use of such person and persons, and of such estate and estates as he shall appoint by his will, that by operation of law, the use doth vest in the feoffor, and he is seised of a qualified fee; that is to say, till declaration and limitation be made according to his power." And that "when a man makes a feoffment to the use of his last will, he has the use in the mean time." (a)

3. A feoffment was made to the use of the feoffor for his life, afterwards to the use of such tenants as he should demise any part of the premises to, for life or years, &c.; afterwards, to the use of the performance of his will, and to the use of such person and persons to whom he should devise any estate in the premises; and after performance of his will, to the use of several persons successively in tail; and ultimately to the use of himself and his heirs forever.

(a) 6 Rep. 18 a.



It was held that nothing vested till the death of the feoffor, \* because he had power by his will to devise to \* 327 any person even in fee simple; from which it followed that, in the mean time, the use of the fee vested in the feoffor, as it was adjudged in Clere's case. (a)

4. In the case of *Davis v. Speed*, (b) Lord Holt put this case,—“If a feoffment in fee is made to the use of A and the heirs of his body begotten, the remainder in fee to the right heirs of T. S., who is then living, in such case, the fee simple is not in abeyance, nor in the feoffee; but the use of the fee shall result to the feoffor, and remain in him until the contingency, *viz.*, the death of T. S. shall happen.”

5. It is the same where a contingent remainder is *created by a devise*; as the *inheritance will descend to the heir* of the devisor.

6. Thus, in the case of *Plunkett v. Holmes*, (c) it was said by Wyndham and Twisden, and agreed by the other Judges, that the fee descended to T. as heir, till the contingency happened, though not so as to confound his estate for life, and was not in abeyance. That in relation to L., T. took only an estate for life; but, in the mean time, by operation of law, he had the fee in such sort, as that there should be an *hiatus*, to let in the contingency when it happened.

7. Sampson Shelton devised to his wife for life; and if she had a son, and caused it to be called by his christian name and surname, then he gave the inheritance of his lands to him; and if he died under twenty-one, then to his own heirs. After the death of the devisor, (without issue,) his widow married (John Broughton,) and procured a conveyance of the inheritance from the heir at law to her husband and herself, and levied a fine to them. (After this, she had a son by Broughton, and called him Sampson Shelton Broughton.)

Saunders urged, that the contingent remainder to the son was not destroyed; for that at the time of the fine, the heir of the testator had no reversion or estate in him; because an estate for life was devised to the wife, and the remainder in fee was devised to her son upon a contingency; so that, until it could be known whether such contingency would happen or not, the re-

(a) Leonard Lovie's case, 10 Rep. 78.

(b) Carth. 262.

(c) *Ante*, c. 6, § 23.

version must be in abeyance, not in the heir; and then his conveyance gave no estate to the husband and wife, but they were only tenants for the life of the wife, as before.

Lord Hale interrupted him; and said it was clear the reversion was in the heir of the testator by descent, not in  
328 \* abeyance. \* Accordingly, it was adjudged that the contingent remainder was destroyed. (a)

8. In the case of *Carter v. Barnardiston*, which has been already stated under another name, a question arose whether the fee was in abeyance, or descended to the testator's heir at law. Sir J. Jekyll considered the fee as in abeyance. But upon an appeal to Lord Parker, this decree was reversed. (b)

330 \* \* 9. Notwithstanding the authority of the preceding cases, the doctrine of the fee simple being in abeyance, was held by Lord Talbot in the following case.

10. A devised lands to B and C, and the survivor of them, and the heirs of such survivor, in trust to sell; the estate was decreed to be sold; and it being referred to the Master to see whether the parties could make a good title, he reported that they could not make a good title, there being no fee simple in the trustees, for that the remainder in fee could only be vested in the survivor, and it was uncertain which of the two trustees would be the survivor. Exceptions being taken to the Master's report, Lord Talbot held that the trustees joining in a fine of the premises, would pass a good title to the purchaser by estoppel; that here the fee was in abeyance.<sup>1</sup> And it being said by the counsel that the heir of the devisor would join in the conveyance to the purchaser, he replied that the heir's joining would supply the want of proving the will, but that in every other respect it would be void. (c)

11. Mr. Fearn has observed that the opinion in this case does not appear to have been the subject of sufficient consideration to be relied on as an authority against the doctrine relative to the descent of the inheritance to the testator's heir; which

(a) *Purefoy v. Rogers*, 2 Saund. 380.

(b) *Lodding v. Kyne*, ante, c. 1, § 55, 59, 62. *Carter v. Barnardiston*, 1 P. Wms. 511.  
2 Bro. P. C. 1.

(c) *Vick v. Edwards*, 3 P. Wms. 372.

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<sup>1</sup> The position, that the fee was in abeyance, is questioned by Mr. Butler, in his note 78, to 1 Inst. 191, a.

appears to have been so directly and fully established by the several cases above stated, that to dispute the descent of the inheritance to the heir at law of the testator, in the case of a contingent remainder created by will, would be sacrificing the authority of a series of cases wherein that point had been solemnly decided, and repeatedly recognized, after the maturest discussion, to the occasional opinion of Lord Talbót, in *Vick v. Edwards*, where that point was not debated, nor the direct subject of decision. (a)

12. The preceding doctrine of the continuance of the inheritance in the grantor and his heirs, or in the heirs of the devisor, are *confined to cases of conveyances by way of use, and dispositions by will*; for different opinions have prevailed in respect to its admission in conveyances at common law.<sup>1</sup>

\* Some have held that in case of a lease for life, re- \* 331  
mainder to the right heirs of J. S., then living, no estate at all remains in the grantor; and that he cannot enter for the forfeiture in case of a feoffment by the tenant for life; whilst others, though disinclined to admit that any estate remains in the grantor in such case, still allow him a right of entry for the forfeiture, upon a feoffment by the tenant for life; no less than on the determination of his estate by death, before the contingency happens. These opinions are founded on an assumption that the remainder must pass out of the donor at the time of the livery, consequently that no estate shall remain in him after such livery; therefore, in the case of a lease to one for life, remainder to the right heirs of J. S., the remainder is in abeyance, or *in nubibus*, or *in gremio legis*; though, says Mr. Fearné, by way of some sort of compromise between common sense, and the supposition of an estate passing out of a man, when there is no person *in rerum natura*, no object besides hard and hardly intelligible words for the reception of it, at the time of the livery, they are

(a) Fearné, Cont. Rem. 525. Ex parte Harrison, 3 Anstr. 836.

<sup>1</sup> The better opinion now is, that this doctrine is applicable to conveyances at common law, in all cases; and that in the case of a lease for life, remainder to the right heirs of J. S., who is then living, the inheritance remains in the grantor, until J. S. dies during the estate for life, and then vests in the persons who are his heirs. See *Shapleigh v. Pilsbury*, 1 Greenl. 271, where the doctrine of abeyance is very fully discussed by Mellen, C. J. 4 Kent, Comm. 258; 1 Inst. 191, a, note 78, by Mr. Butler; *Rice v. Osgood*, 9 Mass. 38.

compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate, before the contingent remainder can take place, entitles the grantor or his heirs to enter, and reassume the estate. (*a*)

13. In 2 Roll's Abridgment, 418, it is laid down, that if a lease for life or in tail be, the remainder to the right heirs of J. S., and tenant for life dies without issue, living J. S., the remainder is void, because J. S. cannot have an heir during his life; and inasmuch as this does not take effect during the particular estate, it shall never take effect, though he dies after and has an heir; in such case, inasmuch as the remainder cannot take effect, the donor shall have the land again. What is this in effect, says Mr. Fearne, but admitting no more actually passed out of the grantor than the estate to the tenant for life, or in tail; until and unless J. S. died before the estate of such tenant determined? (*b*)

14. A contingent remainder of inheritance is, *transmissible to the heirs* of the person to whom it is limited, if such person chance to die before the contingency happens.

15. Richard Lower made a feoffment to the use of himself for life; after the death of himself and P., his wife, to the use of

Thomas, his eldest son, for life; after the death of Richard,  
332\*      ard, and \*P., his wife, and Thomas, to the use of Jane,  
the wife of Thomas, and of such issue male or female, as the said Thomas should beget on her; if Thomas should have no issue by her, then to the use of Jane for life; and after the death of Richard and P., his wife, and Jane, all the lands to the use of Thomas and the heirs male of his body; remainder to the right heirs of Thomas. Thomas had issue a daughter, then made a lease of all the lands by deed indented, for five hundred years; afterwards granted the lands by fine to the lessee for five hundred years, and died in the lifetime of Richard.

It was held that the estate limited to Thomas was a contingent remainder, for the particular estate was only for the life of Richard, whereas Thomas's estate was not to commence till after the death of Richard and P., his wife; and though Thomas levied the fine for five hundred years, and died before the contingency happened, yet his heir afterwards, when the contingency did happen, was bound by the fine, and the lease for five hundred years

(*a*) 1 Inst. 342, b. 1 P. Wms. 515.

(*b*) Vin. Ab. tit. Rem. (I.) Fearne, Cont. Rem. 528.

took place; for it was agreed that the contingent remainder descended to his heir. (a)

16. The same law holds with respect to contingent uses, which will also descend, where the person to whom they are limited, dies before the contingency.

17. Thus, it is laid down in Shelley's case, that if a man seised of the manor of S., covenants with another that when J. S. shall enfeof him of the manor of D., then he will stand seised of the manor of S. to the use of the covenantee and his heirs; the covenantee dies, his heir within age. J. S. enfeoffs the covenantor. Held, that the heir should be adjudged in, in course and nature of a descent; and yet it was neither a right, title, use, nor action that descended, but only a possibility of an use, which could neither be released nor discharged; but it might, if the condition had been performed, have vested in the ancestor; and then the heir had claimed it by descent. (b)

18. Mr. Fearne has observed, that some cases may arise where the *existence of the devisee* of a contingent remainder, at some particular time, may, by implication, enter and make *part of the contingency itself*, upon which such interest is intended to take effect; in which case it *cannot descend*. (c)

19. Thus, in a modern case, where a husband and wife settled certain lands, which were the inheritance of the wife, to the use \* of the wife for life, remainder to the husband for life, \*333 if he and his wife should have any issue that should so long live, remainder to all such children in fee, as tenants in common; if the wife should die without issue, or all such issue should die before twenty-one, then, as to one moiety, to the husband in fee. The husband died in the lifetime of his wife.

The Court was clearly of opinion that, upon all the circumstances of the case, the contingency upon which it was intended that the estate of the husband should arise, was that of his surviving his wife; and that as he died first, the contingency never arose. (d)

20. A contingent remainder might, by the common law, be

(a) Weale v. Lower, Pollex. 54.

(b) Wood's case, 1 Rep. 99, a. Wilson v. Bayley, 3 Bro. Parl. Ca. 195.

(c) Fearne, Cont. Rem. 364.

(d) Moorhouse v. Wainhouse, 1 Black. Rep. 638.

passed by fine, operating by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency. (a)

21. Thus, in the case of *Weale v. Lower*, it was determined, that though the fine operated at first by conclusion, and passed no interest, yet the estoppel should bind the heir; that upon the happening of the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; and that if the fine had been in fee, it would have barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger; but being only for years, the fee was vested and the term good, being drawn out of the fee. (b)

22. Although a contingent remainder cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by estoppel, by deed or fine, or by a common recovery, wherein the person entitled to the contingent estate comes in as vouchee; yet it seems that *contingent estates are assignable in equity*. (c)

23. Contingent remainders were formerly held not to be devisable by the persons entitled thereto, whilst they remained in contingency; but it has been determined in some modern cases, that where contingent remainders are descendible to the heirs of the persons entitled to them, they *may be devised by will*, like any other estates, of which an account will be given hereafter. (d)

(a) Fearn, Cont. Rem. 365. Altered by Stat. 3 & 4 Will. 4, c. 74, § 2.

(b) *Ante*, § 15. *Davies v. Bird*, 1 M. & Yo. 88. *Doe v. Oliver*, 10 Bar. & Cress. 181. *Ib.* 191. *Infra*, vol. 5., Tit. 35, c. 11, § 9. *Vick v. Edwards*, *ante*, § 10.

(c) Fearn, Cont. Rem. 366, 550. Tit. 36. Tit. 38, c. 20.

(d) Tit. 38, c. 3. *Roe d. Perry v. Jones*, 1 Hen. Bl. 30. 17 Ves. 182. (3 T. R. 88.)

## TITLE XVII.

## REVERSION.

## BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 11.

KENT'S COMMENTARIES. Vol. IV. Lect. 63.

COKE upon LITTLETON, 22, b.

FLINTOFF on Real Property. Vol. II. Book I. ch. 4, § 3.

PRESTON on Abstracts of Title. Vol. II. p. 80—85.

SECT. 1. *Description of.*11. *Arises from the Construction of Law.*13. *Is a vested Interest.*16. *But may be divested.*18. *Incidents to Reversions.*21. *After Estates for Years are present Assets.*24. *After Estates for Life are quasi Assets.*SECT. 27. *After Estates Tail are Assets when they come into Possession.*28. *And liable to the Bond Debts of the Settlor.*32. *And also to Leases.*35. *All particular Estates merge in the Reversion.*

SECTION 1. The second kind of estate in expectancy is called a reversion; and is defined by Lord Coke to be *the returning of the land to the grantor or his heirs, after the grant is determined. Reversio terræ est tanquam terra revertens in possessione donatori, sive hæredibus suis, post donum finitum.* In another place, Lord Coke describes a reversion to be, where the residue of the estate always continues in him who made the particular estate. (a)

2. The idea of a reversion is founded on the principle, that where a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him; and the possession of it reverts or returns to him, upon the determination of the preceding estate. Hence Lord Coke

(a) 1 Inst. 22, b. 142, b. Plowd. 151.

says,—“And the law termeth a reversion to be expectant on the particular estate, because the donor or lessor, or their heirs, after every determination of any particular estate, doth expect or look for, to enjoy the lands or tenements again.” (a)

3. If, therefore, a person who is seised in fee conveys his estate to A for life, remainder to B for life, remainder to twenty other persons for life, he still retains the fee simple of the lands, 335\* \* because he has not parted with it. But as that fee simple can only return or fall into possession upon the determination of the preceding estates, it is only an estate in reversion.

4. Before the Statute *De Donis Conditionalibus*, no reversion remained in the donor, after he had created a conditional fee; because the grantee of such an estate was considered as having the entire property of it; and the donor had only a possibility of reverter, not an actual estate in reversion. But as soon as the Statute *De Donis* was made, the Judges held that the estate given to a man and the heirs of his body, was only a particular estate, therefore there remained an estate in reversion in the donor. (b)

5. Lord Coke has observed that this point was once doubted, but without reason, for at the same session of parliament in which the Statute *De Donis* was made, ch. 3, it is expressly said, *vel per donum in quo reservatur reversio*. So that, by the judgment of the same parliament, a reversion was settled in the donor. (c)

6. Where a gift is made of a qualified or base fee, no reversion remains in the donor. For Lord Coke says:—“If lands be given to A and his heirs, so long as B hath heirs of his body, remainder over in fee, the remainder is void.” But Lord C. J. Vaughan observing upon this passage, doubts whether it be law; and says:—“When such a base fee determines for want of issue of the body of B, the land returns to the grantor and his heirs, as a kind of reversion; and if there can be a reversion of such an estate, I know not why a remainder may not be granted of it. (d)

7. Where a person creates an estate for years by lease, he has a reversion as soon as the lessee enters, and not before. But

(a) 1 Inst. 183, b.

(b) Tit. 2, c. 1. Plowd. 248. Lit. § 18, 19.

(c) 1 Inst. 22, b.

(d) 1 Inst. 18, a. Vaugh. R. 269.



when an estate for years is created by a conveyance deriving its effect from the Statute of Uses, the person to whom such estate is limited acquires the actual possession without entry; consequently the person who creates the estate for years has a reversion immediately upon the execution of the conveyance. (*a*)

8. Where a person having only a particular estate in lands, grants a smaller estate than his own, he has a reversion left in himself. Thus, if tenant in tail grants an estate for the life of another, he has a reversion in him; because he has not parted with his whole interest.

\*9. In the same manner, where a person who has an \*336 estate for ninety-nine years, grants it for ninety-eight years, or for any other shorter term, he has a reversion left in him; if he even grants it for ninety-nine years, less one day, he has a reversion.

10. Lord Coke says, if a man extends lands by force of a statute merchant, statute staple, recognizance, or *elegit*, he leaves a reversion in the cognizor. (*b*)

11. A *reversion cannot be created by deed* or other assurance, but *arises from construction of law*. Thus Lord Coke says, if a man makes a gift in tail, or a lease for life, the remainder to his own right heirs, the remainder is void, and he has the reversion in him. So if a man makes a feoffment in fee, to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion is in him by construction of law, and not by the limitation; † because the use of the fee continued ever in him; and the Statute of Uses executes the possession to the use, in the same plight as the use was limited. (*c*)

12. Lord Coke also says, if a man makes a feoffment in fee, to the use of himself in tail, and after to the use of the feoffee in fee, the feoffee has no reversion, but in the nature of a remainder; albeit the feoffor have the estate tail executed in him by the

(*a*) 1 Inst. 46, b. Tit. 8, c. 1, § 12. Tit. 11, c. 4, § 11.

(*b*) 1 Inst. 22, b.

(*c*) 1 Inst. 22, b. Tit. 11, c. 4.

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[† Although it is still true that a *reversion* cannot be created by deed, but arises by construction of law, yet such limitations as those above stated by Lord Coke to the right heirs of the settlor, are now, by the recent statute 3 & 4 Will. 4, c. 106, § 3, made valid, and have the effect of conferring the *remainder* in fee upon the settlor by *purchase*. *Vide supra*, tit. 11, ch. 4, § 34, note.]

Statute of Uses, and the feoffee is in by the common law; which, he says, is worthy of observation. (a).

13. Although a person can only be said to be entitled to, not seised of, an estate in reversion; yet *estates in reversion* are properly classed under the general denomination of *vested interests*; because a person entitled to an estate in reversion has an immediate fixed right of future enjoyment; that is, an estate vested *in presenti*, though it is only to take effect in possession and profit *in futuro*; and which may be aliened and charged much in the same manner as an estate in possession.<sup>1</sup>

(a) 1 Inst. 22, b.

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<sup>1</sup> In Massachusetts, a mesne reversioner, by conveyance from the original reversioner, becomes a new stock of descent; and the reversion, though expectant on the determination of a freehold, vests, by descent, in the heirs of the mesne reversioner, upon his decease during the existence of the tenancy for life. *Miller v. Miller*, 10 Met. 393. That this is also the true exposition of the common law of this country, seems evident from the strong reasoning of Shaw, C. J., in the same case, p. 399, 400; and from that of Mr. Justice Story, in *Cook v. Hammond*, 4 Mason, 467, 484, 485. "The rule," as the latter remarks, "as to reversions and remainders, expectant upon estates in freehold, is, that unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seised in fee and created the particular estate, or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. It is no matter in how many persons the reversion or remainder may, in the intermediate period, have vested by descent; they do not, of course, form a new stock of inheritance. The law looks only to the heir of the donor or first purchaser. But while the estate is thus in expectancy, the mesne heir, in whom the reversion or remainder vests, may do acts, which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new stock. Thus, he may by a grant, or devise of it, or charge upon it, appropriate it to himself, and change the course of the descent. In like manner, it may be taken in execution for the debt of such mesne remainder-man or reversioner during his life, and this, in the same manner, intercepts the descent. But if no such acts be done, and the reversion or remainder continues in a course of devolution by descent, the heir of the first donor or purchaser will be entitled to the whole as his inheritance, although he may be a stranger to all the mesne reversioners and remainder-men through whom it has devolved.

"Now the operation of this doctrine in respect to estates in fee in possession, which are subject to dower and tenancy by the curtesy, is very important. In the former case, though the heir at law may obtain an actual seisin by entry into the whole estate, yet, by the assignment of dower, that seisin, as to the third part assigned as dower, is defeated *ab initio*; for the dowress is in of the seisin of her husband, and her estate is but a continuance of this seisin. The same principle is true of tenant by the curtesy. It is even stronger; for the law vests the estate by curtesy in the husband without any assignment, and even without any entry, if the wife were already in possession, his estate being initiate immediately on issue had, and consummate by the death of his wife. So that there is no chasm between the death of the wife and his possession, as

14. The law is as careful of the rights of the reversioner, as of those of the tenant in possession; and will therefore allow an *\* action to be brought by the reversioner, as well \* 337* as by the tenant in possession, for an *injury done to the inheritance.*<sup>1</sup>

15. A person in reversion brought an action for erecting a wall, whereby his light was obstructed; and obtained a verdict, with general damages. On a motion in arrest of judgment, it was objected, that this action would not lie by a reversioner, being only an injury to the person in possession.

The Court was of opinion that an action might be brought by one, in respect of his possession, and by the other in respect of his inheritance, for the injury done to the value of it; for if the reversioner wanted to sell the reversion, this obstruction would certainly lessen the value of it. (a)<sup>2</sup>

(a) *Jesser v. Gifford*, 4 Burr. 2141. (*Ripka v. Sergeant*, 7 Watts & Serg. 9. *Little v. Palister*, 3 Greenl. 6.)

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there is in case of the death of the husband and the assignment of dower to the wife, in which there can be a mesne seisin. Nothing, therefore, but a reversion passes in such case to the heir. But it is a misnomer to call it a case of *suspended descent*. In such case of curtesy, the reversion descends and vests absolutely in the heir. He may sell it, incumber it, devise it; and it is subject to execution as part of his property during his life. The descent to the heir is not suspended, but the actual seisin of the fee is not in him, since by law the actual seisin is in the tenant by the curtesy." See 4 Mason, 485, 486. See, also, *Marley v. Rodgers*, 5 Yerg. 217. [*Fowler v. Griffin*, 3 Sandf. Sup. Ct. 385.]

<sup>1</sup> Timber trees, cut for sale by the tenant for life, become immediately the personal property of the reversioner; and he may maintain an action for them. *Richardson v. York*, 2 Shepl. 216. [Reversioners entitled to land only upon the determination of a life-estate, have no right to authorize the cutting, during the life-estate, of trees standing upon the land. *Simpson v. Bowden*, 33 Maine, (3 Red.) 549. A house was built and occupied by a reversioner, with the assent of the tenant for life, and was subsequently conveyed by the reversioner. *Held*, that the grantee could not enter and occupy the house against the tenant for life. *Cooper v. Adams*, 6 Cush. 87.]

The statute of *New York* gives the reversioner or remainder-man an action of waste against the tenant, or trespass against a stranger, for any injury to the inheritance, notwithstanding any intervening estate for life or years; and admits him to defend as a party to suits against the tenant. And his right to restitution is not barred by any judgment against the tenant. *New York Rev. Stat. Vol. II. p. 34, § 8; Ibid. p. 433, § 1, 2, 3, 3d ed.; Livingston v. Haywood*, 11 Johns. 429. The first of these provisions is also found in *Indiana*, *Rev. Stat. 1843, ch. 28, § 225*. And see *ante*, ch. 6, § 3, note. If the act was done by a stranger, by authority of the tenant, *trespass* will not lie against him. *Livingston v. Mott*, 2 Wend. 605.

<sup>2</sup> The right of the reversioner is not affected by a descent cast, nor by the Statute of Limitations, if a particular estate existed at the time of the disseisin, or when the

16. An estate in reversion expectant on an estate for life may be *divested* by the *feoffment* of the *tenant for life*; by which nothing but a right of entry will remain in the reversioner. (a) †

17. But where the particular estate was only *for years*, a fine levied by the termor would not have that effect.

18. The usual *incidents* to an estate in reversion are said to be *fealty* and *rent*; where no rent is reserved out of the particular estate, fealty results of course, and may be demanded as a badge of tenure.

19. Lord Coke says, that in the case of a gift in tail, lease for life, or years, fealty is an incident inseparably annexed to the reversion; so that the donor or lessor cannot grant the reversion over, and save to himself the fealty, or such like service: 338\* but the \*rent he may except, because the rent, though it be incident to the reversion, yet is not inseparably incident. (b)<sup>1</sup>

(a) Hard. R. 401. *Goodright v. Forrester*, tit. 35, c. 12.

(b) 1 Inst. 143, a. 151, b. (*Condit v. Neighbor*, 1 Green, 83.)

adverse possession began; for the right of entry did not then exist; and the laches of the tenant for life shall not operate to his injury. *Jackson v. Schoonmaker*, 4 Johns. 390; *Jackson v. Mancius*, 2 Wend. 357. [A reversioner is not bound to enter immediately for a disseisin of, or a forfeiture by, the tenant for life, but a new right of entry accrues at the death of such tenant, and the Statute of Limitations begins to run against the reversioner from that time, how long soever the tenant may have been dispossessed; *Miller v. Ewing*, 6 Cush. 34, 41; *Foster v. Marshall*, 2 Foster, (N. H.) 491.]

The injury, to entitle the reversioner to an action, must be such as is necessarily prejudicial to his reversionary right. If the act be injurious only to the particular tenant, he alone can maintain the action. *Jackson v. Pesked*, 1 M. & S. 234; *Little v. Palister*, 3 Greenl. 6; *Randall v. Cleveland*, 6 Conn. R. 328.

† [Previously to the 31st day of December, 1833, his fine would have the same operation: the fine, however, is now abolished by the recent statute 3 & 4 Will. 4, c. 74. The effect of a feoffment, and of a fine by tenant in tail in possession, to work a discontinuance of the reversion, has been noticed under a former title. The reversioner, as before stated, was thereby deprived of his right of entry, and put to his real action. But real actions (except writs of right of dower, writ of dower *unde nihil habet*, *quare impedit*, an ejectment and plaint for freebench or dower) are taken away by statute 3 & 4 Will. 4, c. 27, § 36, 37, after the first day of June, 1835; from which period, it would seem that there will not virtually be any difference between a right of action and a right of entry, for the recovery of real estate—the right of entry being in effect the right to bring an ejectment.] Tit. 2, c. 2, § 7—12.

1 A grant of the reversion, whether absolutely, or in mortgage, entitles the grantee to the rents which subsequently accrue, as incident to the reversion; but not to the rents then in arrear. *Burden v. Thayer*, 3 Met. 76; *Birch v. Wright*, 1 T. R. 378; *Demarest v. Willard*, 8 Cowen, 206; *Peck v. Northrop*, 17 Conn. 217.

20. It has been stated that curtesy and dower are incident to reversions expectant on estates for years, but not to reversions expectant on estates of freehold. (a)<sup>1</sup>

21. A reversion expectant on the determination of a *term for years*, is *present assets*, for payment of debts. For the heir cannot plead a term of this kind, created by his ancestor, in delay of execution, but must confess assets.<sup>2</sup>

22. In an action of debt against the heir, upon the obligation of his ancestor, the defendant, not denying the action or obligation, pleaded that his ancestor was seised in fee, and that he demised the same for 500 years to A, who entered; and that the said reversion descended, *et riens ultra*; and that, at the time of the action brought, he had no tenements in fee simple by descent, except the said reversion. It was not questioned, but judgment ought to be given for the plaintiff; the doubt was, whether general or special. The Court was of opinion that a general judgment ought to be given. And Lord Holt said, it had been a doubt, whether the heir could plead a term for years in delay of present execution; and, though there were even some precedents to that purpose, yet he was of opinion, the heir could not plead a term in delay, but ought to confess assets: for the reversion is assets, and the common law had no regard to a term for years. And there is no mischief in this: for though, in consequence, a *levari facias* may go, yet the lessee may maintain himself against an ejectment by virtue of his lease. (b)

23. In a subsequent case the Court of Common Pleas acquiesced in the doctrine laid down by Lord Holt; but gave judgment upon another point. (c)

24. A reversion expectant on the determination of an *estate for life* is *quasi assets*, and ought to be pleaded specially by the

(a) Tit. 5, c. 2, § 23. Tit. 6, c. 2, § 8. (Robison v. Codman, 1 Sumn. 121, 130. 4 Dane's Abr. 664.)

(b) Smith v. Angel, 1 Salk. 354. 2 Ld. Raym. 783. 7 Mod. 40. Osbaston v. Stanhope, 2 Mod. 50. 2 Inst. 321.

(c) Villers v. Handley, 2 Wils. R. 49.

<sup>1</sup> The purchaser of a term of years must surrender to the reversioner, and not to the vendor. Bruce v. Halbert, 3 Monr. 64.

<sup>2</sup> [Where the statute makes a reversionary interest liable to attachment on mesne process, and to be taken on execution for the debts of the owner, the reversion of a *feme covert* may be levied on for debts of her contracting before coverture. Moore v. Richardson, 37 Maine, (2 Heath,) 438.]

heir; and in such case the plaintiff may take judgment of it *quando acciderit.* (a)

25. In debt against the niece, as cousin and heir to the uncle, the obligor, the defendant confessed the bond by *nient dedire*, but that nothing in fee simple descended to her beside a reversion of thirty acres of marsh in S., &c., after the death of such  
339\* a \* one. It was held that the plaintiff might pray a special judgment upon the confession, viz., that he should recover the debt and damages of the aforesaid reversion, to be levied when it should fall in; and a special writ should issue to extend the whole thirty acres. (b)

26. A man, seised of a reversion expectant upon an estate for life, bound himself and his heirs in a bond, and died, living the tenant for life; it was held that this reversion should be assets in the hands of the heir, whenever it came into possession. (c)

27. A reversion, expectant on the determination of an *estate tail*, is said *not to be assets during the continuance of the estate tail*. But this is only because, during that time, it is considered to be of no value; as it is in the power of the tenant in tail to bar and destroy it whenever he pleases, by suffering a common recovery. But whenever a reversion of this kind falls into possession, it then becomes assets. (d)

28. A reversion of this kind is *liable to the bond debts* of the person who was originally seised of the fee simple in possession of the estate, and who afterwards created the preceding estates.

29. In a special verdict it was found that John Rowden, the father of Richard, (the defendant,) was seised in fee of a mesuage, &c.; and, being so seised, had issue John Rowden, his eldest son, and the defendant; that John, the eldest, settled the premises on himself for life, remainder to John his eldest son in tail male, remainder to his own right heirs. After the death of the father, John, his eldest son, entered and was seised in tail, and also entitled to the reversion in fee, and died leaving an only son, who soon after died without issue; whereupon the lands descended to the defendant as heir to his nephew, who entered, and was seised in fee. The question was, whether he was liable to the payment of a bond debt of his father's. The counsel on

(a) (Kellow v. Rowden, Carth. 129. Whitney v. Whitney, 14 Mass. 88, 91.)

(b) Dyer, 373, b. pl. 10.

(c) Rook v. Clealand, 1 Ld. Raym. 53. Lutw. 503.

(d) 1 Roll. Ab. 269. Tit. 2, c. 2.

both sides agreed that the reversion, having come into possession by the determination of the estate tail, was chargeable with the debt; and the only doubt was, whether the plaintiff ought to have named the intermediate heirs to the reversion. Three of the Judges observed that the question was not, whether the defendant was liable to the debt, but whether he was properly charged as heir to his father, or whether he should have been charged as heir to his nephew, who was last seised. And it \* must be admitted, that if the lands had descended to \* 340 the brother and nephew of the defendant in fee, then they ought to have been named; but they had only a reversion in fee, expectant upon an estate tail, which was uncertain, and therefore of little value. But here the reversion in fee was come into possession, and the defendant had the land as heir to his father; it was assets only in him; and was not so either in his brother or nephew, who were neither of them chargeable; because a reversion, expectant upon an estate tail, was not assets. (a)

30. Though a reversion of this kind should be devised away, yet it will still be assets for payment of the bond debts of the settlor. For by the statute 3 Wm. and Mary, c. 14, † such a devise is rendered fraudulent and void against creditors.

31. A settlement was made in 1707 of lands, by Thomas Delahaye to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, reversion to his own right heirs. Thomas, being indebted by bond to several persons, and, among others, to one Blacket, gave him a collateral security of some stock, which was transferred for that purpose, and agreed to be retransferred upon payment of principal and interest; and, being likewise indebted by simple contract, died in 1724, leaving issue one son, Thomas. In 1725, there was a decree obtained, by which the father's estate was directed to be sold for the payment of his debts, and the simple contract creditors to stand in the place of the bond creditors; and, under this decree, some fee simple lands were sold and applied. In 1738, Thomas, the son, devised the

(a) *Kellow v. Rowden*, 3 Mod. 253. (Carth. 126, 1 Show. 244, S. C.)

† [Repealed and amended enactments substituted by 11 Geo. 4, and 1 Wm. 4, c. 47, § 2, 3, &c. See also 3 & 4 Wm. 4, c. 104.]

settled estate to the defendant, and died without issue; whereby the estate tail was spent, and the reversion in fee came into possession. The plaintiffs brought their bill to have this estate applied towards satisfaction of their debts, notwithstanding the devise of it by the son. And now the question was, whether this reversion in fee was to be considered as real assets of the father, applicable to the payment of his debts; or if it was prevented from being so by the devise of the son. (a)

(And it was decreed, that the estate descended from Thomas the father, and devised by Thomas the son, was liable and should be applied in satisfaction of the debts due to the plaintiffs.<sup>1</sup>)

32. A reversion expectant on an estate tail is also *liable to the leases* made by all those who were at any time entitled to it, and to all the covenants contained in those leases, whenever such reversion comes into possession.

33. William Martin, being tenant in tail with the immediate reversion in fee in himself, demised the premises to Elizabeth Westcombe for ninety-nine years, if two persons should so long live, to commence after the determination of a preceding lease. William Martin died, leaving issue Nicholas Martin his eldest son and heir; who, being the issue in tail, and also entitled to the immediate reversion in fee, levied a fine to the use of himself and his heirs.

It was resolved, that, as the reversion in fee came into possession by the operation of the fine, the lease became a charge on that reversion; and could not be avoided either by Nicholas Martin, or the cognizee of the fine. (b)

34. Charles Lord Shelburne, being tenant in tail male of the lands in question, with remainder to his brother Henry in tail male, remainder to his own right heirs; demised them  
361 \* for three \* lives, with covenants for perpetual renewal.  
Charles Lord Shelburne died without issue, by which

(a) *Kynaston v. Clarke*, MS. Rep. 2 Atk. 204.

(b) *Symonds v. Cudmore*, 4 Mod. 1. *Vide* tit. 38.

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<sup>1</sup> By Stat. 3 & 4 Will. 4, c. 104, all the interest in any freehold, customary or copyhold lands, of which any person may die seised, is made assets for the payment of his specialty and simple contract debts. See *ante*, tit. 1, § 56, note. In the United States, all real property is made liable for the debts of the owner; and may be reached, after his death, through his executor or administrator; and in certain cases, through the heir. *Ibid.* § 58, note; *Webber v. Webber*, 6 Greenl. 127.



means his brother Henry became entitled to an estate in tail male in the premises, with the reversion in fee in himself. In the year 1697, Henry Lord Shelburne levied a fine of those lands; and, in consideration of his marriage, settled them on himself for life, with remainder to his first and other sons.

The lessees having claimed a renewal on the death of some of the persons for whose lives the leases were granted, Henry Lord Shelburne refused to renew, alleging, that as his brother Charles was only tenant in tail of the lands comprised in those leases, he had no power to make them, and was not bound by the covenants for renewal.

The Court of Exchequer in Ireland decreed that Henry Lord Shelburne should renew those leases. From this decree there was an appeal to the House of Lords, who affirmed the decree. (a)

\* 35. All *particular estates are subject to merge in the* \* 362 *reversion*, whenever the same person becomes entitled to both, except estates tail. And when, previously to the statute 3 & 4 Will. IV. c. 74, the protection of the Statute *De Donis Conditionalibus* was taken away from estates tail, and they were converted into base fees, then they merged in the reversion, and became liable to the charges and leases of all those who were at any time entitled to such reversion; but now, by the 39th section of the above statute, such base fees do not merge. (b)

(a) *Shelburne v. Biddulph*, 6 Bro. Parl. Ca. 356.

(b) Tit. 35, c. 12. Tit. 39, Merger.

## TITLE XVIII.

## JOINT TENANCY.

## BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 12.

KENT'S COMMENTARIES. Vol. IV. Lect. 64.

COKE upon LITTLETON, 179, *b.*—188, *a.*

FLINTOFF on Real Property. Vol. II. Book I. ch. 5, § 2.

PRESTON on Abstracts of Title. Vol. II. p. 62—68.

LOMAX'S DIGEST. Vol. I. tit. 15.

CHARLES BLAKE ALLNATT. A Practical Treatise on the Law of Partition.

## CHAP. I.

## NATURE OF AN ESTATE IN JOINT TENANCY.

## CHAP. II.

## HOW A JOINT TENANCY MAY BE SEVERED AND DESTROYED.

## CHAP. I.

## NATURE OF AN ESTATE IN JOINT TENANCY.

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| <p>SECT. 1. <i>Estates in Severalty.</i><br/>         2. <i>In Joint Tenancy.</i><br/>         11. <i>Circumstances required to this Estate.</i><br/>         12. <i>Unity of Interest.</i><br/>         16. <i>Unity of Title.</i><br/>         17. <i>Unity of Time.</i><br/>         26. <i>Unity of Possession.</i><br/>         27. <i>Joint Tenancies go to the Survivor.</i><br/>         33. <i>Not favored in Equity.</i><br/>         38. <i>Who may be Joint Tenants.</i></p> | <p>SECT. 45. <i>Husband and Wife cannot be Joint Tenants.</i><br/>         51. <i>Not subject to Curtesy or Dower.</i><br/>         53. <i>Joint Tenants cannot charge their Estates.</i><br/>         57. <i>Except by Lease.</i><br/>         59. <i>In what Acts they must all join.</i><br/>         63. <i>The possession of one is that of the other.</i><br/>         65. <i>Remedies against each other.</i></p> |
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SECTION 1. With respect to the number and connection of the owners of real estates, lands and tenements may be *held in four different ways*; namely, in severalty, joint tenancy, coparcenary, and common.

Where a person holds lands in *his own right only, without having any other joined or connected with him* in point of interest, during the estate therein, he is said to hold in *severalty*.

\* 2. But where lands are *granted to two or more persons*, to hold to them and their heirs, or for term of their lives, or for term of another's life, *without any restrictive, exclusive, or explanatory words*; all the persons named in such instrument, to whom the lands are so given, take a *joint estate*, and are called joint tenants. For the law will interpret a grant of this kind, so as to make all its parts take effect, which can only be done by creating an equal interest in all the persons who take under it. (a) †<sup>1</sup>

(a) Lit. § 277. (*Aveling v. Knipe*, 19 Ves. 441.)

† [Sometimes lands are ignorantly conveyed or devised to two (trustees) and the survivor of them and the heirs of the survivor; this does not create a joint tenancy in fee, but gives a joint estate for life, and a contingent remainder to the survivor. Until the contingency happens, the fee results to the grantor, or to the heir at law of the devisor. 3 Anstr. 836; 2 Ves. jr. 209, 210; Butl. Co. Lit. 191, a, note (1); Fearn, C. R. 357.]

<sup>1</sup> In the United States, the general rule is, that all estates vested in two or more persons, are to be deemed tenancies in common, unless a different tenure is clearly expressed or implied in the instrument creating the estate. So it is declared, in the statutes of *Maine, New Hampshire, Massachusetts, Vermont, Rhode Island, New York, New Jersey, Delaware, Michigan, Indiana, Illinois, Missouri, and Arkansas*. In several of these States, however, certain cases are specially excepted from the operation of the statutes; thereby leaving them to be governed by the rules of the common law. Thus, all estates, vested in trustees and executors as such, are excepted in the statutes of *New York, Michigan, Indiana, Illinois, Missouri, and Arkansas*. Mortgages, also, are excepted in the statutes of *Maine, Michigan, and Indiana*; and conveyances to husband and wife also are excepted, in the statutes of *Massachusetts, Vermont, Michigan, and Indiana*; and by construction, in *New Jersey*. *Den v. Hardenberg*, 5 Halst. 42. In other States, the only change by statute, is the abolition of the *jus accrescendi*, or right of survivorship. This has been done, without any exception, in *Georgia, Florida, Kentucky, Mississippi, Alabama, and Virginia*; [but the statute in *Alabama*, applies only to those who hold the property in their own right and not to those who hold as trustees merely, or in *autre droit*. *Parsons v. Boyd*, 20 Ala. 112]; and in *Pennsylvania*, with the exception of estates vested in trustees; and in *North Carolina* and *Tennessee*, with the exception of estates held by commercial partners, as partnership property. In *Connecticut*, the existence of the right of survivorship has been denied by the Courts. 1 Root, 48. In *Ohio*, also, the Courts have declared that estates in joint tenancy were always unknown. *Walker's Introd.* p. 292; *Sergeant v. Steinberger*, 2 Ohio R. 306; *White v. Sayre*, *Ibid.* 103; *Miles v. Fisher*, 10 Ohio R. 1.

See *Maine*, Rev. St. 1840, ch. 91, § 13; *N. Hamp.* Rev. St. 1842, ch. 129, § 2, 3; *Mass.* Rev. St. ch. 59, § 10, 11; *Verm.* Rev. St. 1839, ch. 59, § 2, 3; *R. Island*, Rev. St. 1844, p. 197, § 16; *N. York*, Rev. St. Vol. II, p. 12, § 44, 3d ed.; *Elm. Dig.* p. 86, § 38; *Penn.* *Dunlop, Dig.* p. 240, ch. 190; *Delaware*, Rev. St. 1829, p. 167; *Tate's*

3. An estate in joint tenancy can *arise only by purchase or grant*, that is, by the *act of the parties*, and never by the mere act of law. As to the words by which this estate may be created, the cases on that point will be stated in *Title XXXII. Deed*, and *Title XXXVIII. Devise*.<sup>1</sup>

4. An estate in joint tenancy *may be had in remainder*. Thus if a gift be made to two men, and the heirs of their two bodies, remainder to them two and their heirs; they are joint tenants of the remainder in fee. (a)<sup>2</sup>

(a) 1 Inst. 183, b.

Dig. p. 725; 1 Lomax, Dig. p. 477; N. Car. Rev. St. Vol. I. p. 258; Georgia, Rev. St. 1845, p. 413, ch. 15, § 46; Florida, Rev. St. 1845; Thompson's Dig. p. 191; Michigan, Rev. St. 1837, p. 258, § 8, 9; Kentucky, Rev. St. 1834, Vol. II. p. 876, 877; Tenn. Rev. St. 1836, p. 417; Indiana, Rev. St. 1843, ch. 28, § 18, 19; Illinois, Rev. St. 1839, p. 149; Missouri, Rev. St. 1845, ch. 32, § 13; Mississippi, Rev. St. 1840, ch. 34, § 59; Ala. Toulm. Dig. p. 249; Ark. Rev. St. 1837, ch. 31, § 9. [See Maryland Act, 1822, c. 162. *Craft v. Wilcox*, 4 Gill, 504.]

It has been held in *Massachusetts*, that a conveyance to two or more *in mortgage*, [to secure a debt jointly due to the mortgagees,] creates a joint tenancy, [until the mortgage is foreclosed,] notwithstanding the statute; on the ground that as, upon the death of one, the remedy to recover the debt would survive, it is clearly to be implied that the parties intended that the collateral security should follow and comport with the remedy. *Appleton v. Boyd*, 7 Mass. 131; *Goodwin v. Richardson*, 11 Mass. 469. [But after foreclosure such estate is held by the mortgagees as tenants in common. *Goodwin v. Richardson*, *ubi supra*.] But this was denied by Story, J., and the contrary held, under a similar statute of *Rhode Island*, in *Randall v. Phillips*, 3 Mason, R. 378. [See *Root v. Bancroft*, 10 Met. 44, and *Root v. Stow*, 13 Ib. 5.]

The statute of *Virginia*, abolishing the *jus accrescendi*, has been held to extend to partnership property, as well as all other. *Delancy v. Hutchinson*, 2 Rand. 183.

In most of the statutes turning joint tenancies into tenancies in common, it is expressly declared that the law shall apply as well to existing joint tenancies as to those afterward to be created. But it is held that the statutes have this effect, *proprio vigore*, and without any such express words; the law being beneficial, by rendering the tenure more certain and valuable. *Miller v. Miller*, 16 Mass. 61; *Bombaugh v. Bombaugh*, 11 S. & R. 191.

Grants of townships to several persons, by the State, have always been deemed to create tenancies in common, on the ground of intention in the State, and of public policy. *Higby v. Rice*, 5 Mass. 350; *University, &c. v. Reynolds*, 3 Verm. 543. [It is not sufficient that the words employed by the parties, would, but for the act of Maryland, 1822, ch. 162, be construed to create a joint tenancy, unless the instrument expressly provides that the land shall be held in joint tenancy. *Purdy v. Purdy*, 3 Md. Ch. Decis. 547.]

<sup>1</sup> If two or more jointly disseise another they become joint tenants by this act, as well as if it were a grant. Lit. § 278; *Putney v. Dresser*, 2 Met. 583, 586. [But see *Fowler v. Thayer*, 4 Cush. 111.]

<sup>2</sup> A devise to A for life, remainder to B and C, and their heirs, makes them joint tenants. *Campbell v. Heron*, 1 Tayl. 199.

5. Where lands are conveyed to two persons, and the heirs of one of them, they are joint tenants for life, and the fee simple is in one of them. If the person who has the fee dies, the other shall hold the entirety, by survivorship, during his life. In the same manner, where lands are given to two persons, and the heirs of the body of one of them, they are joint tenants for life, and the estate tail is in one of them. (a)

6. Lord Coke says, when land is given to two, and to the heirs of one of them, he in remainder cannot grant away his fee simple.

Mr. Hargrave observes that there is a seeming difficulty in this passage, but conceives Lord Coke's meaning to be, that though for some purposes the estate for life of the joint tenant having the fee is distinct from, and unmerged in, his greater estate; yet for granting, it is not so; but both estates are in that respect consolidated, notwithstanding the estate of the other joint tenant. Therefore, that the fee cannot, in strictness of law, be granted as a remainder, *eo nomine*, and as an \* 365 interest distinct from the estate for life. (b)

7. Two persons may have an estate in *joint tenancy for their lives*, and yet have *several inheritances*. Thus Littleton says, "If lands be given to two men, and to the heirs of their bodies begotten, the donees have a joint estate for term of their lives, and yet they have several inheritances. For if one of the donees hath issue and die, the other which surviveth shall have the whole term for his life; and if he which surviveth also have issue and die, then the issue of one shall have one moiety, and the issue of the other the other moiety; and they shall hold the land between them in common, and are not joint tenants, but tenants in common. And the cause why such donees have a joint estate for term of their lives is, for that at the beginning, the lands were given to them two; which words, without more saying, make a joint estate to them for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them, as a man and a woman may, the law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift; and this is, to the heirs

(a) Lit. § 285.

(b) 1 Inst. 184, b. n. 2.

which the one shall beget of his body by any of his wives ; and to the heirs which the other shall beget of his body by any of his wives ; so as it behooveth by necessity of reason that they have several inheritances." (a)

8. Littleton says, it is the same where lands are given to two females, and the heirs of their two bodies. And Lord Cowper has observed that where there was a devise to the testator's *two daughters*, and the *heirs of their two bodies*, it was a *joint estate for life*, with *several inheritances*. But the testator never meant that the surviving daughter should turn out the issue of her deceased sister. (b) That was the point upon the appeal in *Wilkinson v. Spearman*, where the Lords inclined to the appellant; yet the Judges all agreeing that the law was so settled, the Lords would not alter it. His Lordship also said that a devise to the testator's two daughters and their issue, and in default of such issue, to J. S., gave them a joint estate for life, and several inheritances. (c)

9. If a person gives lands to two men and one woman, and the heirs of their three bodies begotten; in this case they 366 \* have \*several inheritances. For though it might be said that the woman may by possibility marry both the men, one after another; yet, first, she cannot marry them both *in præsentia*; and the law will never intend a possibility upon a possibility; as first to marry the one, and then to marry the other. So it is if a gift be made to one man and two women, *mutatis mutandis*. (d)

10. In the same manner, if a gift in tail be made to a man and to his mother, or to a man and to his sister, or his aunt, the parties take several inheritances; because they cannot marry. Lord Coke says that in all these cases there is no division between the estates for life, and the several inheritances; for they cannot convey away the inheritance after their decease, because it is divided only in supposition and consideration of law; and to some purposes the inheritance is said to be executed. (e)

11. The nature of a joint tenancy requires the following circumstances: 1. *Unity of interest*. 2. *Unity of title*. 3. *Unity of time*. 4. *Unity of possession*; or, in other words, joint tenants

(a) Lit. § 283.

(b) Lit. § 284. *Cook v. Cook*, 2 Vern. 545.

(c) Printed Cases, 1705. 2 P. Wms. 530.

(d) 1 Inst. 184, a.

(e) 1 Inst. 182, b. 184, a.

have one and the same interest, accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession.

12. With respect to *unity of interest*, one joint tenant cannot be entitled to one period of duration, or quantity of interest, and the other to a different one. One cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other tenant in tail. It has, however, been stated that where an estate is limited to *two persons, and to the heirs of one of them*, they are *joint tenants for life*. (a)

13. If a man demises lands to two persons, to hold to the one for life, and to the other for years, they are not joint tenants. For an estate of freehold cannot stand in jointure with a term of years, and a reversion upon a freehold cannot stand in jointure with a freehold and inheritance in possession. (b)

14. It is, however, said by Lord Coke, that a *right of action* and a *right of entry may stand in jointure*.<sup>1</sup> For at common law, the alienation of the husband was a discontinuance to the wife of one moiety, and a disseisin of the other; so, as after the death of the husband, the wife had a right of action to one moiety, and the other joint tenant a right of entry into the other;

\* but they were joint tenants of the right, because they \*367 might join in a writ of right. (c)

15. Secondly, that a *right of action*, or a *bare right of entry*, cannot stand in jointure with a freehold or inheritance in possession; therefore, if the husband made a feoffment of the moiety, this was a discontinuance of that moiety; and the other joint tenant remained in possession of the freehold and inheritance of the other moiety; which, for the time, was a severance of the jointure. (d)

16. As to *unity of title*, the estate of joint tenants must be created by the same act or instrument, whether legal or illegal; as

(a) *Ante*, § 5.

(b) 1 Inst. 188, u.

(c) 1 Inst. 188, a.

(d) 1 Inst. 188, a.

<sup>1</sup> The case put by Lord Coke is, where a husband and wife and a third person purchased land to them and their heirs; whereby the husband and wife acquired a moiety, and the third person the other moiety; and the husband aliened the whole to a stranger in fee, and died. Here, the wife had a right of action only, the husband's alienation having discontinued her estate, by the common law; and the third person had a right of entry. 1 Inst. 187, b.

by one and the same feoffment; grant, fine, or other conveyance or assurance, or by one and the same disseisin; for a joint tenancy cannot arise by descent or act of law, as has been already observed, but only by purchase or acquisition of the party.

17. With respect to *unity of time*, the estate must *become vested in all the joint tenants at one and the same instant*, as well as by one and the same title. Thus, if lands be demised for life, remainder to the right heirs of J. S. and J. N., J. S. hath issue and dies, and afterwards J. N. hath issue and dies, the issues are not joint tenants; because the one moiety vested at one time, and the other moiety at another time. (a)

18. Lord Coke, however, says, that in *some cases* there may be joint tenants, and yet the estate may *vest in them at several times*. Thus, if a man makes a feoffment, to the use of himself, and of such wife as he shall afterwards marry, for term of their lives; and after he takes a wife, they are joint tenants; and yet they come to their estates at several times. (b)

19. A man made a feoffment in fee, to the use of himself for life; then to the use of every one of his issue female, and to the heirs of their bodies; then to the issue of one daughter at one time, of a second daughter at another time, and of a third daughter at another time; so that this was to vest severally in them, and afterwards to all. Lord Coke said it was adjudged that they were joint tenants; and yet they came in at several times; but the reason of this was, because the root was joint. (c)

20. A person devised lands to his two sons, and the heirs of their bodies; and that his executors should have them 368\* until they \*came to their several ages of twenty-one years. The question was, whether one of them might enter; for it was objected that it was a joint estate to them, which could not be, if they should have several commencements. But four of the Judges were of opinion, that when either of them came to the age of twenty-one, he should then have his part and possession; and yet the joint tenancy should take place. (d)

21. A person levied a fine to the use of himself for life, remainder to his wife for life, remainder to Sir Peter Temple and Anne, his wife, for their lives, and the life of the survivor of them, remainder to their first and other sons in tail, remainder to the

(a) 1 Inst. 188, a.

(b) 1 Inst. 188, a. Gilb. Uses, 71. Tit. 16, c. 5.

(c) Blandford v. Blandford, 3 Bulst. 101.

(d) Aylor v. Chep, Cro. Jac. 259.



issues female of their bodies, and the heirs of their bodies begotten. Sir Peter Temple had issue by Anne, two daughters, Anne and Martha. Martha died without issue; afterwards Anne died. It was argued that the two sisters were tenants in common. But, per Holt, the estate was limited by way of use to the issues female, and issues female comprehended all issues female. Then the case was, tenant for life, remainder to all his issues female, &c. If the tenant for life has but one daughter, she shall have the whole estate tail; if he has more daughters, they shall be joint tenants for life, with several inheritances. The case in Coke, Lit. 188, *a*, of a feoffment to the use of himself for life, and of such wife as he should afterwards marry, and then he marries, he and his wife are joint tenants, would rule the case in question; for it was a joint claim by the same conveyance which made joint tenants, and not the time of vesting. (*a*)

22. Lands were devised to a woman and her children, on her body begotten, or to be begotten, by W. A. and their heirs forever. It was determined that the devisee and all her children took as joint tenants; and it was no objection that by this means the several estates might commence at different times. (*b*)

23. Although *some of the persons* to whom an estate is limited be *in by the common law*, and *others by the Statute of Uses*, yet they will take in *joint tenancy*.

24. A fine was levied to A and B, to the use of the said A and B, and also to C. Adjudged, that they were all joint tenants; though A and B were in by the fine, and C by the Statute of Uses. (*c*)

25. In a modern case, which will be stated hereafter, Lord Thurlow held, that whether a settlement was to be considered as \* a conveyance of a legal estate, or a deed to \* 369 uses, would make no difference; and that the vesting at different times would not prevent its being a joint tenancy. (*d*)

26. With respect to *unity of possession*, joint tenants are said to be seised *per my et per tout*; that is, *each of them has the entire possession*, as well of every part, as *of the whole*. They have not one of them a seisin of one half, and the other of the remaining half; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety

(*a*) *Sussex v. Temple*, 1 Ld. Raym. 310. *Ante*, § 18. (*b*) *Oates v. Jackson*, 2 Stra. 1172.

(*c*) *Watts v. Lee, Noy*, 124. *Sammes's case*, tit. 32, c. 21. (*d*) *Stratton v. Best*, *Idem*.

of the whole, not the whole of an undivided moiety. From which it followed that the possession and seisin of one joint tenant was the possession and seisin of the other.†

27. The union and entirety of interest which exists between joint tenants has given rise to the *principal incident to this estate* which is the *right of survivorship*. Thus Littleton says:—"If three joint tenants be in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joint tenant hath issue, and die, yet the third which surviveth shall have the whole tenements, to him and his heirs forever." (a)

28. The right of survivorship *takes place in estates for years*, as well as in freehold estates. Thus Littleton says:—"If a lease of lands or tenements be made to many for term of years, he which surviveth of the lessees shall have the tenements only, during the term, by force of the same lease." And this benefit of survivorship takes place on a lease for years to two, though one of the lessees dies before entry. (b)

370 \*      \* 29. The *trust of a term in joint tenancy* shall go to the survivor, in equity as well as at law.

30. A lease was made for ninety-nine years, in trust for Eleanor and Mary Smith. Eleanor died; her executor obtained an assignment of the lease from the trustee; the administrator of the other sister brought a bill to have the whole term by survivorship. Lord Cowper said, a trust of a term must go as the term at law would have gone; and as survivorship would have taken place at law, it must do so in equity. Decreed, the defendant to account for the profits from the death of Eleanor, and to assign the term to the plaintiffs, or as they should appoint. (c)

(a) Lit. § 280.

(b) Lit. § 281. 1 Inst. 46, b.

(c) *Aston v. Smallman*, 2 Vern. 556. 2 P. Wms. 530.

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[† But now by the statute 3 & 4 Will. 4, c. 27, § 12, the above rule is in some measure qualified. The words of the act are: "That when any one or more of several persons, entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt, of or by such last-mentioned person or persons, or any of them."]

31. Two joint purchasers of a lease for years assigned it to a third person, who was a friend of one of the joint tenants, with the consent of the other; but it was without consideration, and no declaration of trust was given; which the defendant confessed in his answer. The question was, whether this trust should result for the benefit of the survivor, or whether the creditors of the joint tenant who died should come in for an equal moiety in equity. The two joint tenants had continued to receive the profits jointly, after the assignment. The Court was of opinion that though the right of survivorship was looked upon as odious in equity; yet, in this case, the trust should survive, for the benefit of the surviving *cestui que trust* only. (a)

32. There are, however, *some cases*, in which there may be a joint tenancy, *without an equal right of survivorship*. Thus, if lands are let to A and B during the life of A, if B dies, A shall have all by survivorship; but if A dies, B shall have nothing. (b)

33. As the right of survivorship is often attended with hardship and injustice, the *courts of equity* have taken a latitude in *construing against joint tenancies*, on the ground of intent.<sup>1</sup>

34. Thus, where two persons advanced a sum of money by way of mortgage, took the mortgage to themselves jointly, and then one of them died. Decreed, that when the money came to be paid, the survivor should not have the whole, but that the representative of the person who died should have a proportion. (c) †

(a) *Rex v. Williams*, Bunb. 342.

(b) 1 Inst. 181, b.

(c) *Petty v. Styward*, 1 Ab. Eq. 290.

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<sup>1</sup>The common law favored survivorship, because it prevented the severance and multiplication of feudal services, and strengthened the feudal connection. But this reason ceased, on the abolition of feudal tenures, in the reign of Charles 2, 4 Kent, Comm. 361.

† [It frequently occurs that settlement-moneys are lent by the trustees upon mortgage, and in the mortgage deed no notice is taken of the settlement, in order that it may not incur the mortgagee's title: the mortgage is made to the trustees in fee, and upon the face of the security the trustees appear to be the beneficial owners of the money advanced; so that although the legal estate survives upon the death of either of the trustees, the survivor cannot, consistently with the equitable doctrine above stated, give a complete discharge for the mortgage money when paid off. In order to obviate this inconvenience in the case of trust money, it is proper to insert a clause that upon the death of either of the mortgagees the receipt of the survivor, his executors, &c., shall be a sufficient discharge for the whole money, and that the survivor, his heirs, &c., may

371 \*     \* 35. It was laid down by Sir Joseph Jekyll, that if two or more purchase lands, advance the money in equal proportions, and take a conveyance to them and their heirs, it is a joint tenancy; that is, a purchase by them jointly of the chance of survivorship. But when the proportions of the money are not equal, and this appears in the deed itself, it makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the other, in proportion to the sums advanced by each of them. So if two or more make a joint purchase; afterwards one of them lays out a considerable sum of money in repairs and improvements, and dies; this shall be a lien on the land, and a trust for the representative of him who advanced it. (a)

36. The defendant, Craddock's father, the plaintiff Lake, and three others, five in all, having entered into an undertaking to drain the overflowed lands of West Thorock, the trustees for the sale, by the consent and direction of the commissioners of sewers, did by deed indented and enrolled, dated the 8th February, 1695, in consideration of £5145 paid to the commissioners by the five purchasers, convey the same to the defendant Craddock's father, the plaintiff Lake, the three others, and their heirs; upon which several sums of money were expended in carrying on the undertaking. The plaintiff Lake brought his bill against the rest of the partners, or their representatives, for an account and division of the partnership estate; the only question was, whether these five purchasers, having made this purchase jointly, so as to become in law joint tenants, the same should survive in equity. Sir Joseph Jekyll decreed that no survivorship

372 \*     should take place; for that the payment of money \* created a trust for the parties advancing the same; and undertaking upon the hazard of profit or loss was in the nature of merchandising, when the *jus accrescendi* was never allowed; that supposing one of the partners had laid out the whole money, and had happened to die first, according to the contrary

(a) 1 Ab. Eq. 290. (2 Story, Eq. Jur. § 1206.) Aveling v. Knipe, 19 Ves. 441. (And see Swan v. Swan, 8 Price, 518.)

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reconvey the estate, discharged from the mortgage debt, without the concurrence of the personal representatives of the deceased trustee. This in effect makes the trustees *quasi* joint tenants of the money.]

construction, he must have lost all, which would have been most unjust. Wherefore it was decreed that these five purchasers were tenants in common. Upon an appeal, the decree was affirmed by Lord King. (a)

37. Lord Hardwicke has assented to this doctrine; and has observed, that the Court of Chancery had taken a latitude in construing a tenancy in common, without the words *equally to be divided*, on the foot of the intent; and therefore determined, that if two men jointly and equally advance a sum of money on a mortgage, suppose in fee, and take that security to them and their heirs, without the words “equally to be divided between them,” there shall be no survivorship. So, if they were to foreclose the estate, it should be divided between them, because their intent was presumed to be so. It had been said, indeed, that if two men made a purchase, they might be understood to purchase a kind of chance between themselves, which of them should survive; but it had been determined that if two purchased, and one advanced more of the purchase-money than the other, there should be no survivorship, though there were not the words “equally to be divided,” or “to hold as tenants in common;” which showed how strongly the Court had leaned against survivorship, and created a tenancy in common by construction, on the intent of the parties. (b)

38. All *natural persons may be joint tenants*; but *bodies politic or corporate cannot be joint tenants* with each other. Nor can the king, or a corporation, whether sole or aggregate, be joint tenant with a natural person.<sup>1</sup>

39. Thus Lord Coke says,—If lands be given to two bishops, to have and to hold to them two, and their successors; seeing they take this purchase in their political capacity, as bishops, they are not joint tenants; because they are seised in several rights; for the one bishop is seised, in right of his bishopric, of the one moiety, and the other bishop, in right of his bishopric, of the other moiety; and so by several titles, and in several capacities; \*whereas joint tenants ought to have \*373

(a) *Lake v. Craddock*, 3 P. Wms. 158.

(b) *Rigden v. Vallier*, 2 Ves. 258. (*Randall v. Phillips*, 3 Mason, R. 379, 386. 2 Story, Eq. Jur. § 1206.

<sup>1</sup> [*Telfair v. Howe*, 3 Rich. Eq. 235.]

it in one and the same right and capacity, and by one and the same joint title. (a)

40. But if lands be given to A. de B., bishop of N., and to a secular man, to have and to hold to them two and their heirs; in this case they are joint tenants, for each of them takes the lands in his natural capacity. (b)

41. This rule does not, however, hold in the case of chattels real; for if a lease for years be made to a bishop and a secular man, they are joint tenants; because, in this case, the bishop does not take in his political capacity. (c)

42. If lands be given to the king, and to a subject, to have and to hold to them and to their heirs, yet they are not joint tenants; for the king is not seised in his natural capacity, but in his royal and political capacity, *jure coronæ*; which cannot stand in jointure with the seisin of a subject, in his natural capacity. (d)

43. Lord Coke also says, if an alien and natural born subject purchase lands in fee, they are joint tenants; but the king, upon office found, shall have a moiety. (e)

44. Husband and wife being considered in law as one person, if an estate be conveyed to *husband and wife, and to a stranger*, the husband and wife will only take one moiety between them, and the stranger will take the other moiety. (f)

45. As there can be no moieties between *husband and wife* they *cannot be joint tenants*; therefore, where an estate is conveyed to a man and his wife, and their heirs, it is not a joint tenancy; for joint tenants take by moieties, and are each seised of an undivided moiety of the whole. But husband and wife being but one person, cannot, during the coverture, take separate estates; therefore, upon a purchase made by them both, each has the entirety, and they are seised *per tout*, not *per my*; and the husband cannot forfeit or alien the estate, because the whole of it belongs to his wife as well as to him.<sup>1</sup>

(a) 1 Inst. 190, a.

(b) Idem.

(c) 1 Inst. 190, a.

(d) Idem.

(e) 1 Inst. 180, b, n. 2.

(f) Lit. § 291. (Johnson v. Hart, 6 Watts & Serg. 319.)

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<sup>1</sup> Thus, if a promissory note or bond is made to husband and wife, with a mortgage to them for collateral security, the debt and estate survive to the wife, as joint tenant; and this, as well at law as in equity. See *Draper v. Jackson*, 16 Mass. 480, where the

46. William Ocle, and Joan his wife, purchased lands to them two, and their heirs. Afterwards William Ocle was attainted of high treason, for the murder of the king's father, Edward II., and was executed; Joan his wife survived him. King Edward III. granted the lands to Stephen de Bitterby and his heirs. John Hawkins, the heir of the said Joan, in a petition \*to the king, disclosed this whole matter; and, upon a \*374 *scire facias* against the patentee, had judgment to recover the lands. (a)

47. J. Andrews purchased a copyhold estate, and took a surrender of it to himself, his wife, and his daughter, and their heirs. J. Andrews, being visible owner of the estate, mortgaged it to the plaintiff, and died. The plaintiff brought his bill against the mother and daughter to discover their title, and to set aside their estates, as fraudulent against the plaintiff, who was a purchaser. The Court dismissed the bill; because the husband and wife took one moiety by entirety, so that the husband could not alien or dispose of it, to bind the wife, and the other moiety was well vested in the daughter. (b) †

48. A copyhold estate was surrendered to the use of John Fitzwalter and Elizabeth his wife, and the longer liver of them; after the death of the longer liver, to the right heirs of the said John and Elizabeth forever. Lord Chief Justice De Grey said, this case fell exactly within a nice distinction laid down in our ancient law books, and which, having never been overruled, continued to be law. The same words of conveyance, which would make two other persons joint tenants, would make a husband and wife tenants of the entirety; so neither could sever the jointure, but the whole must accrue to the survivor.

Sir W. Blackstone observed that this estate differed from joint tenancy, because joint tenants took by moieties, and were each seised of an undivided moiety of the whole *per my et per tout*; which drew after it the incident of survivorship, or *jus accre-*

(a) 1 Inst. 187, a.

(b) *Back v. Andrews*, 2 Vern. 120. Prec. in Cha. 1.

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cases are cited and reviewed. See also *Shaw v. Hearsey*, 5 Mass. 521; *Fox v. Fletcher*, 8 Mass. 274; *Varnum v. Abbot*, 12 Mass. 474; *Christ's Hosp. v. Budgin*, 2 Vern. 683; *Coppin v. —*, 2 P. Wms. 496.

† [*Vide Effingham v. Carew*, 1 And. 39, and *Dyer*, 332, *contra*.—This was not a decision of a court of justice, but only an award.—*Note to former Edition.*]

*scendi*. But husband and wife being considered in law as one person, they could not, during the coverture, take separate estates ; upon a purchase made by them both, they could not be seised by moieties, but both and each had the entirety. They were seised *per tout*, and not *per my* ; the husband, therefore, could not alien or devise that estate, the whole of which belonged to his wife, as well as to himself. (a)

49. A person devised a copyhold estate to John Freestone and Lucy his wife, and to their heirs and assigns forever.  
375 \* J. Freestone \* the devisee, was admitted, and surrendered to James Rickson in fee. Upon the death of John Freestone, Lucy his widow, was admitted, and brought an ejectment against the person who claimed under her husband's surrender.

Lord Kenyon : — “ We are now in a court of law, and we are called upon to decide the legal rights of the parties. It seems to me, from the manner in which the case is drawn, to have been intended to be argued that the devise in the first will to J. Freestone and Lucy his wife, created a joint tenancy ; but that question has been properly abandoned ; for though a devise to A and B, who were strangers to and have no connection with each other, creates a joint tenancy, the conveyance by one of whom severs the joint tenancy, and passes a moiety ; yet it has been settled for ages that when the devise is to the husband and wife, they take by entireties, not by moieties ; and the husband alone cannot, by his own conveyance, without joining his wife, divest the estate of the wife. This is sufficient to warrant us, sitting in a court of law, in determining in favor of the present plaintiff.” (b)

50. But where an estate is conveyed to *a man and a woman who are not married*, and who afterwards intermarry ; as they took originally by moieties, they will continue to hold by moieties after the marriage. (c)

51. It was formerly held that where lands were given to *two women, and the heirs of their two bodies* begotten, the husband of one of them, having issue, should be tenant by the curtesy,

(a) *Green v. King*, 2 Black. Rep. 1211. *Doe v. Wilson*, 4 Barn. & Ald. 303. (2 Bl. Comm. 182. *Shaw v. Hearsay*, 5 Mass. 521. *Thornton v. Thornton*, 3 Rand. 179. *Jackson v. Stevens*, 16 Johns. 110. *Den v. Hardenburg*, 5 Halst. 42. 4 Kent, Comm. 362.)

(b) *Doe v. Parratt*, 5 Term R. 652. *Vide Owen v. Morgan*, tit. 36, c. 10.

(c) 1 Inst. 187, b. *Moody v. Moody*, Ambler 649.



living the other; the inheritance being executed. But Lord Coke observes that Littleton has cleared up this doubt, by showing that the inheritance is not executed; therefore the husband cannot be entitled to an estate by the curtesy. (a)

52. The widow of a joint tenant in fee or in tail, is not entitled to dower; because, upon the death of her husband, the estate goes to the other joint tenant; who is then in, from the first feoffor or donor, and may plead such feoffment or gift as originally made to himself, without naming his companion. (b)

53. In consequence of the right of survivorship among joint tenants, all charges made by a joint tenant on the estate determine by his death, and do not affect the survivor; it being a maxim of law, that *jus accrescendi præfertur oneribus*.

\* 54. Thus Littleton says, if there are two joint tenants \* 376 in fee, and one of them grants a rent charge, by deed, out of that which belongs to him; in this case, during the life of the grantor, the rent charge is effectual; but after his decease it is void; for he who hath the land by survivorship shall hold it discharged; because he is in by survivorship, and claims under the original feoffment, not by descent from his companion. (c)

55. If one joint tenant acknowledges a recognizance or a statute, or suffers a judgment in an action of debt to be entered up against him, and dies before execution had, it shall not be executed afterwards; but if execution be sued in the life of the cognizor, it shall then bind the survivor. But Lord Coke observes that as well in the case of a rent charge, as of a recognizance, statute or judgment, if he who makes the charge survives, it is good forever. (d)

56. If one joint tenant in fee simple be indebted to the king, and dies, no extent shall be made, after his decease, upon the land, in the hands of the survivor. (e)

57. There is one exception to this rule; for if there are two joint tenants in fee, and one of them makes a lease for years to a stranger, it will be good against the survivor; even though such lease does not commence till after the death of the joint

(a) 1 Inst. 30, a. 183, a.

(b) Lit. § 45. 1 Inst. 37, b.

(c) Lit. § 286.

(d) 1 Inst. 184, a. Abergavenny's case, 6 Rep. 78. Vide tit. 14, § 62.

(e) 1 Inst. 185, a.

tenant who made it; *because* it is an *immediate disposition* of the land. (a)

58. If two persons are joint tenants for life, and one grants his moiety to J. S., to have for certain years, to commence after the death of his companion; and the other moiety to the said J. S. by the same deed, to have from the death of the lessor for certain years, and dies; the survivor shall hold the land discharged of any lease, notwithstanding this grant. For the lease of his own moiety, which he might have leased, was not to commence till after the death of his companion, and he had not any power to lease the other moiety which belonged to his companion; so all was void. (b)

59. In consequence of the intimate union of interest and possession which exists between joint tenants, they are *obliged to join in many acts*. Thus joint tenants must formerly have done *homage*, and must now do *fealty* together. (c)

60. There are, however, many cases where they need not at all join; and where the act of one will be considered as 377\* the act of \*all. Thus the *entry of one joint tenant* is deemed the *entry of all*; and the *seisin and possession* acquired by such entry, is the seisin and possession of them all. (d)

61. Every act done by one joint tenant, for the benefit of himself and his companion, shall be deemed the act of both. Thus, *livery of seisin made to one joint tenant will enure to both*; the *entry or reëntury of one joint tenant* is as effectual as that of both. So, where joint tenants make a lease, and the lessee *surrenders to one* of them, this will enure to both; because they have a joint reversion. (e)

62. If there are two joint tenants for life or years, and *one of them commits waste*, this is deemed *waste by them both*, as to the place wasted; but treble *damages* shall be recovered *only against the person who actually committed the waste*. (f)

63. It has been stated that in consequence of the unity of possession which exists between joint tenants, the possession of

(a) 1 Inst. 185, a. 2 Roll. Ab. 89. 2 Vern. 323. (11 East, 288.)

(b) Whitlock v. Huntwell, 2 Roll. Ab. 89.

(c) 1 Inst. 67, b.

(d) 6 Mod. 44. *Infra*.

(e) 1 Inst. 49, b. Id. 192, a.

(f) 2 Inst. 302. Tit. 3, c. 2.

one is the possession of the other;† from which it followed, that a joint tenant could *never be disseised by his companion*, but by an *actual ouster*. So that if one joint tenant levied a fine of the whole estate, it would not amount to an ouster of his companion. (a)

64. At *common law*, joint tenants had *no remedy against each other*, where *one alone had received the whole profits* of the estate; for he could not be charged as bailiff or receiver to his companion.<sup>1</sup> But now, by the statute 4 & 5 Ann. ch. 16, s. 27, *actions of account* are maintainable by one joint tenant, his executors or administrators, against the other, as bailiff, for receiving more than his share. (b)<sup>2</sup>

65. By the statute of Westm. 2, ch. 22, one joint tenant may have an action, by writ of waste, against his companion. But Lord Coke observes that this act does not extend to castles, houses, or other places, for habitation of man; for one joint tenant might, for their reparation, have had a writ *De Reparatione faciendâ*, ‡ at common law. (c)<sup>3</sup>

(a) 1 Salk. 392. 2 Salk. 423. 1 East, 568. 1 Bar. & Ald. 85. (4 Kent, Comm. 370.)

(b) 1 Inst. 200, b. (Wheeler v. Horne, Willes, 208. Fanning v. Chadwick, 3 Pick. 420, 423.)

(c) 2 Inst. 403.

[† The law is now altered by statute 3 & 4 Will. 4, c. 27, § 12, which enacts that the possession of one coparcener joint tenant, or tenant in common, shall not be the possession of the others. *Vide supra*, § 26.]

[‡ These writs were abolished by the statute 3 & 4 Will. 4, c. 27, § 36, after the 31st Dec. 1834. See, also, § 37.]

<sup>1</sup> If one joint tenant or tenant in common *destroy* the common property, trespass, and, in some cases, trover, will lie for the other, against the wrongdoer. 1 Inst. 200; 2 Saund. 47, *h.* by Williams. And see 2 Greenl. on Evid. § 646, note 8, where the cases on this subject are collected. If one cuts down and sells the trees, the other may recover his part of the proceeds in *assumpsit*. Miller v. Miller, 7 Pick. 133; 9 Pick. 34.

<sup>2</sup> This statute has been reënacted in some of the United States, and adopted and acted upon by the courts in others, and probably in all the States in which the action of account was used. And as the proceedings in this form of remedy are tedious, and as *indebitatus assumpsit* will in general lie wherever *account* will lie, the latter remedy has fallen into disuse, and *assumpsit* is resorted to in its stead. See 1 Leon. 219; 12 Mod. 517; 1 Com. Dig. 115, tit. Accompt, A. 1; Wilkin v. Wilkin, 1 Salk. 9; Carth. 89, S. C.; Jones v. Harraden, 9 Mass. 540, note; Brigham v. Eveleth, Ibid. 538; Munroe v. Luke, 1 Met. 459, 464; Sargent v. Parsons, 12 Mass. 152; 4 Kent, Comm. 369; Miller v. Miller, 7 Pick. 133.

<sup>3</sup> By the common law, joint tenants and tenants in common were bound jointly to maintain not only houses and mills, *pro bono publico*, they being for the habitation and use of man; 1 Inst. 200, b; but also bridges, party walls, pumps, wells, gutters, sewers,

and the like, owned and used as their common property and for the common benefit; Fitzh. N. B. [127] 295; *Registrum Brevium*, 153, b; and this upon principles of common justice and equity. *Campbell v. Mesier*, 4 Johns. Ch. R. 334; 4 Kent, Comm. 371; Story, Eq. Jur. Vol. I. § 505; *Ibid.* Vol. II. § 1235. The remedy was by the writ *De reparatione faciendâ*, but now, in this country, by an action on the case, or, if there be a special agreement, by an action of *assumpsit*. But, to support an action on the case, there must have been a previous request by the plaintiff, to the defendant, to join in making the necessary repairs. See the above authorities; and *Loring v. Bacon*, 4 Mass. 577; *Doane v. Badger*, 12 Mass. 65; *Mumford v. Brown*, 6 Cowen, 475; 1 Dane, Abr. 719, 720. See further, *Percy v. Millaudon*, 18 Mart. 616; *Newton v. Newton*, 17 Pick. 201.

If the property is destroyed by the negligence of one of the owners, the others may have a joint remedy against him, by an action on the case. *Chesley v. Thompson*, 3 N. Hamp. R. 9.

Where the parties are owners in severalty of upper and lower rooms under the same roof, if one repairs the roof or foundation, it has been held that the other is not liable, in an action at law, to contribute to such repairs; for they are separate dwelling-houses, and not common property. *Loring v. Bacon*, *supra*.

In some States, laws have been enacted for the repairs of mills, enabling the majority of owners to make repairs, and to reimburse themselves out of the tolls and profits. Where this provision exists, it has been adjudged that the common-law remedy is superseded. *Carver v. Miller*, 4 Mass. 359. See Maine, Rev. St. 1840, ch. 86, § 4; Mass. St. 1795, ch. 74, § 6; Rev. St. ch. 116, § 49, 50; Michigan, Rev. St. 1837, p. 534, § 2. In New Hampshire, the repairs are ordered and the expenses ascertained and certified by the selectmen of the town, on petition of any owner; and an action is given to recover the amount from the party receiving the benefit. N. Hamp. Rev. St. 1842, ch. 135, § 1—7. [See *Buck v. Spofford*, 31 Maine, (1 Red.) 34. Joint tenants and tenants in common have now an action of waste, as well as an account for the profits. *Shiels v. Stark*, 14 Geo. 429.]

## CHAP. II.

## HOW A JOINT TENANCY MAY BE SEVERED AND DESTROYED.

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| SECT. 2. <i>Destruction of the Unity of Interest.</i><br>8. <i>Of the Unity of Title.</i><br>9. <i>Of the Unity of Possession.</i><br>10. <i>By Alienation to a Stranger.</i><br>19. <i>Exception,—Devise.</i><br>20. <i>By an Agreement to alien.</i><br>22. <i>By the Alienation of one Joint Tenant to another.</i> | SECT. 29. <i>By voluntary Partition.</i><br>30. <i>By Writ of Partition.</i><br>38. <i>By Partition in Chancery.</i><br>41. <i>By an Agreement to make Partition.</i><br>46. <i>By devolving to one Person.</i> |
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SECTION 1. An estate in joint tenancy may be *severed and destroyed* by the *destruction of any of its constituent unities*, except that of *time*; which, as it respects only the original commencement of the estate, cannot be affected by any subsequent transaction.

2. An estate in joint tenancy is destroyed by the *destruction of the unity of interest*, which may be done either by the *act of the parties*, or by the *operation of law*.

3. Thus Lord Coke says,—If a man makes a *lease to two* for their lives, and *after grants the reversion to one of them in fee*, the jointure is severed, and the reversion is executed for the one moiety; and for the other moiety there is tenant for life, the reversion to the grantee. (a)

4. A, tenant for life, remainder to B and three others for life, the reversion to C and his heirs expectant. C levied a fine to A and B, to the use of A for life; after his death, to the use of B in fee; A died, and afterwards B died. The question was, whether the jointure was severed or not. It was resolved that the jointure was severed, and this difference taken; when the fee is limited by one and the same conveyance, there one person may have a fee simple, and the other an estate for life jointly;

(a) 1 Inst. 182, b.

but when they are first tenants for life, and afterwards  
 379 \* one of them acquires the fee simple, there the \* jointure  
 is severed. As if a man makes an estate to three, and  
 to the heirs of one of them, there one of them hath fee simple,  
 yet the jointure continues; for all is but one entire estate,  
 created at one and the same time; therefore the fee simple can-  
 not merge the jointure, which took effect with the creation of  
 the remainder in fee. But when three are joint tenants for life,  
 and afterwards one purchases the fee, there the fee simple merges  
 the estate for life; for the estate for life was *in esse* before, and  
 might be merged or surrendered, and so cannot the estate for  
 life in the first case. In the same case, that is to say, when an  
 estate is made to three, and to the heirs of one of them, and he  
 who hath the fee dies, and one of the survivors purchases the re-  
 mainder, the jointure is severed, *causâ quâ supra*. And when  
 one tenant for life purchases the reversion in fee, if the jointure  
 should remain, he would have a reversion in fee, and an estate  
 for life also in part; which reversion in fee he might grant over,  
 and his estate for life would remain in part; which would be ab-  
 surd, and against reason; for, in the first case, when an estate is  
 made to three, and to the heirs of one, he who hath the fee can-  
 not grant over his remainder, and continue in himself, an estate  
 for life. (a)

5. So, if a lease be made to two men for term of their lives,  
 and after, the lessor grants the reversion to them two, and to the  
 heirs of their two bodies, the jointure is severed. (b)

6. Where the *reversion in fee descends to one* of the persons  
 who is joint tenant for life, the joint tenancy will thereby be  
 severed.

7. A man, having issue three sons, devised lands to his two  
 youngest sons jointly for their lives. Afterwards, the eldest son,  
 who had the reversion in fee, died, by which it descended to the  
 second son. This was held to be a severance and destruction of  
 the jointure, by operation of law. (c)

8. An estate in joint tenancy may also be destroyed by the  
*destruction of the unity of title*. Thus, if one of the joint tenants  
*conveys his share to a stranger*, it is a severance of the joint  
 tenancy; for the grantee and the remaining tenant hold by

(a) *Wiscot's case*, 2 Rep. 60. *Ante*, c. 1.

(b) 1 Inst. 182, b.

(c) 2 And. 202.

several titles; the alienee coming into one moiety by the conveyance of one of the joint tenants, and the other joint tenant holding the other moiety by the first feoffment. (a)

9. Another mode of destroying an estate in joint tenancy is, \*by *disuniting the possession*; for joint tenants \*380 being seised *per my et per tout*, every thing that tends to narrow that interest, so that each of them ceases to be seised of the whole and of every part, is a severance and destruction of this estate.

10. Thus, it has been stated, that an *alienation* by one joint tenant *to a stranger* severs the joint tenancy, by destroying the unity of title. It also severs it, by destroying the unity of possession; for the alienee and the remaining tenant have several freeholds. (b)

11. Littleton says, if there be *two joint tenants in fee*, and one of them makes a *lease for life to a stranger*, the joint tenancy is severed. Lord Coke observes that, in this case, there is also a severance of the reversion. And it has been stated that a lease for years made by one joint tenant will bind his companion, so that it operates as a severance *pro tanto*. (c)

12. So, if two be joint tenants of a lease for twenty-one years, and the one of them lets his part for certain years, part of the term, the jointure is severed, and the survivorship destroyed; because a term for a small number of years is as high an interest as for many more years. (d)

13. A *mortgage by a joint tenant*, for a term of years, will operate as a severance of the joint tenancy.

14. Three persons being joint tenants of the trust of a term for years, one of them mortgaged his third part. The question was, whether the joint tenancy was severed. Lord Cowper held that it was a severance; for, in the case of a joint tenancy, which was a thing odious in equity, it would be a disadvantage to the mortgagor not to have it construed a severance. (e)

15. Alienations of this kind must, however, be valid and good in law, to have this effect; for a conveyance by a joint tenant to his wife, being *void at law*, will not operate as a severance of a joint tenancy. (f)

(a) Lit. § 292. (Denne v. Judge, 11 East, 288.)

(b) Ante, § 8.

(c) Lit. § 302. Ante, c. 1, § 57.

(d) 1 Inst. 192, a.

(e) York v. Stone, 1 Ab. Eq. 293. 1 Salk. 158. (Simpson v. Ammons, 1 Binn. 175.)

(f) Tit. 32, c. 2.

16. A joint tenant of a church lease, being taken ill on a journey, and wishing to sever the joint tenancy, that he might provide for his wife, sent for the schoolmaster of the town, and directed him to prepare an instrument for that purpose. The schoolmaster drew a kind of deed of gift of the lease from the sick man to his wife, which he executed, and died. The deed being void in law, the widow endeavored to establish it  
381\* in \*equity; but her bill was dismissed, it being voluntary, and without consideration. (a)

17. *Articles of agreement by an infant*, though made in consideration of marriage, will not operate as a severance of a joint tenancy.

18. Ann May, previous to her marriage, being then an infant, and possessed of a considerable leasehold estate, held in joint tenancy with her two sisters, by articles of agreement made between her, of the first part, John Hook, her intended husband, of the second part, and trustees of the third part, covenanted and agreed that the leasehold estates should be assigned to John Hook for his own use and benefit. The marriage took effect. Ann May died under age. The question was, whether these articles were, in equity, a severance of the joint tenancy.

Lord Bathurst said, the first point attempted to be established was, that had Ann May been of full age when she entered into the articles, they would have amounted to a severance; but no determination to that effect had ever been made. The co-joint tenants were not in this case to be considered as volunteers, as they claimed by a title paramount; and their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his ancestor. The utmost which the infant could do would be an avoidable act; and of course it would be in the discretion of the Court, either to give or refuse their assistance to it. By a parity of reason, it must always be in their power to model such contracts at their pleasure. The contract in the present case was not such as the Court would uphold. Had the infant lived to come of age, and a bill been filed against her for the performance of the articles, the Court would have set them aside, and referred it to a Master to draw new proposals for a proper

(a) *Moyse v. Giles*, Prec. in Cha. 124.



settlement. As the contract was not such as would have bound the infant herself, *à fortiori*, it should not bind the co-joint tenants. It would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint tenancy; as, if that were allowed, it would always be in the power of the infant to say whether the joint tenancy should be severed or not. Then, if any of the co-joint tenants should die under age, the infant might avoid his own act, by pleading *infra ætatem*, and resort to his title by survivorship; which would be \*a great injustice and hardship on the co-joint \*382 tenants. On these grounds he was of opinion that the articles did not amount, in equity, to a severance of the joint tenancy. (a)

19. Regularly, *every disposition* by one joint tenant, in order to bind his companion, *must be an immediate one*; for the other joint tenant claiming the whole, under the original feoffment or grant, the whole must descend to him, unless his companion has disposed of his share in his lifetime. From which it follows that *a devise can in no case operate as a severance of a joint tenancy*; it being a maxim of law, that *jus accrescendi præfertur ultimæ voluntati*. (b)

20. It is said, that if a joint tenant *agrees to alien*, and does it not, but dies, it would be a strange decree to compel the survivor to perform the agreement. Lord Hardwicke, observing on this passage, says—"If the articles were such as amounted to a severance in equity, in such case this Court would decree against the survivor." (c)

21. In case of *May v. Hook*, Lord Bathurst appears to have been of opinion that this point had never been decided; but, in a modern case, Lord Alvanley, M. R., said—"A covenant by a joint tenant to sell, though it does not sever the joint tenancy at law, will in equity. I have always understood this as a settled point, and have no difficulty upon it." (d)

22. An estate in joint tenancy may also be destroyed by the *alienation of one joint tenant to another*. And the *proper conveyance* in this case is *by release*; for one joint tenant cannot

(a) *May v. Hook*, 1 Inst. 246, a. n. 1. 1 Bro. C. C. 112. *Infra*, § 20.

(b) (*Duncan v. Forrer*, 6 Binn. 193.)

(c) 2 Vern. 63. 2 Ves. 634. (*Brown v. Raindle*, 3 Ves. 257.)

(d) *Ante*, § 18. 3 Ves. 257. (5 Binn. 126.)

enfeoff his companion, because they are both actually seised of the whole estate.<sup>1</sup>

23. Thus, if there be two joint tenants in fee, and one of them releases to the other, this will destroy the joint tenancy, and vest the whole estate in the releasee, who will then hold in severalty; and the releasee shall, for many purposes, be adjudged in from the first feoffor. (*a*)

24. If there are *three joint tenants*, and *one of them releases by deed to one of his companions* all the right which he hath in the land, the releasee has a third part of the land with himself and his companion in common; and he and his companion shall

hold the remaining two parts in joint tenancy.† But if  
383\* one \*joint tenant releases to all the others, they are in from the first feoffor or grantor, and not from him who released; and they continue to hold in joint tenancy. (*b*)

25. If one joint tenant grants a rent out of his part, afterwards releases to his companion, and dies, the companion shall hold the land charged with this rent, because he comes to the estate by his own act, namely, by acceptance of the release, not by survivorship. (*c*)

26. Thus, where two persons were joint tenants in fee, and one granted a rent-charge in fee, and afterwards released to the other; it was resolved that although, to some intents, he to whom the release was made, was *in* by the first feoffor and no degree was made between them; yet, as to the grantee of the rent-charge, he was *in* under the first joint tenant who released; and by acceptance of the release, he had deprived himself of the ways and means to avoid the charge; for the right of survivorship was the sole means to have avoided it, and that right was utterly taken away by the release. (*d*)

(*a*) 1 Inst. 278, b.

(*b*) Lit. § 304. Bro. Ab. Joint Tenant, pl. 2.

(*c*) 1 Inst. 185, a.

(*d*) Abergavenny's case, 6 Rep. 78, b.

<sup>1</sup> If the estate of one joint tenant be taken in execution for his debt, and sold, or set off by extent, this is a severance of the joint tenancy. *Remmington v. Cady*, 10 Conn. R. 44. ♥ [In a release between joint tenants or coparceners, a fee will pass without words of limitation. But conveyances between tenants in common cannot operate by way of release, and must contain the word "heirs," to pass a fee. *Rector v. Waugh*, 17 Mis. (2 Bennett,) 13.]

† [So where one of three or more joint tenants conveys his share to a stranger, it is a severance only as to his share; the remaining shares continue to be held in joint tenancy, and consequently subject to survivorship among the remaining joint tenants. Co. Lit. 304; *Gale v. Gale*, 2 Cox, Ca. 156; *Denne v. Judge*, 11 East, 288.]

27. Three persons being joint tenants for life, one of them sealed and delivered a deed to another, in which it was expressed that he granted, bargained, sold, assigned, set over, and confirmed to the other, all the right, estate, title, interest, claim, and demand of the grantor, of and to the lands holden, in jointure. The question was, whether this deed was sufficient to pass the part or share of the joint tenant who made the deed, to the other to whom the deed was made, or not. It was adjudged clearly, without argument, that it was. And it was said by the Chief Justice, that though the jury had found that he *granted*, yet the Court would adjudge that he released; which was the proper conveyance for one joint tenant to pass his estate to the other. (a)

28. John Stile and Susan, a feme sole, were joint tenants for life. Susan took husband, who by fine granted to Stile, *tene-menta prædicta et totum et quicquid habent pro termino vitæ* of the said Susan; *et illa ei reddidit, habendum* to him and his assigns, for the life of the said Susan; and warranted it to him and his heirs, during the life of the said Susan. The question \* was, whether this fine should enure by way of \* 384 release, or by grant of the estate, and severance of the jointure of the moiety, so that this estate should enure during the life of Susan. It was resolved that it should enure by way of release, and not by way of grant; and although it was granted by fine, it as well enured by way of release, as a grant by deed; and the rather for the words *ei reddidit*, which enured by way of release: and both estates being vested in him, the law should vest that in him, as if he had it from the feoffor. And although it was objected that he had one estate from the feoffor by deed, and the other estate by the fine, so being by matter of record, he could not divide it, yet it was said that both estates being vested in him, the law should adjudge it in him, as by the first limitation.

Doderidge held, that by whatever means he came to the estate of his companion, it should enure by way of release; that he should be said *in* of the entire estate, as by the feoffment. Therefore, if one joint tenant bargained and sold by deed enrolled to his companion, it should enure by way of release, and

(a) *Chester v. Willan*, 2 Saund. 96.

that he should be said *in* of the entire estate, as by the feoffment. And if one joint tenant bargained and sold by deed enrolled to his companion, although that vested the use, and the statute vested the possession; yet, being in him, the law should construe it to be entirely in him, and by division of estate. (a)

29. Joint tenants may destroy their estate by a *voluntary partition* among themselves. But such partitions must, at all times, have been made *by deed*; except where the estate was only for years, for there they might make partition without deed. (b)

30. By the *common law*, one joint tenant *could not compel* the other to make *partition*, except by the custom of some particular boroughs. But by the statute 31 Hen. VIII. c. 1, reciting the inconveniences which joint tenants lay under, it is enacted that all joint tenants of any estate or estates of their own inheritance, in their rights, or in right of their wives, in any manors, &c. shall and may be coerced and compelled to make partition between them of all such manors, &c. as they hold as joint tenants, by writ *De Partitione faciendâ*, in that case to be devised in Chancery. (c)<sup>1</sup>

31. As this statute only extended to joint tenants having an *estate of inheritance*, an act was made, 32 Hen. VIII. c. 32, by which joint tenants *for life or years* are enabled to make partition of their estates.

32. In this action there are *two judgments*: the first, *Quod partitio fiat inter partes prædictas, de tenementis, cum pertinentiis*. And upon this there goes out a judicial writ to the sheriff, to make partition; which recites, first, the writ of partition and judgment, and then commands the sheriff, together with twelve men of the vicinage, &c. to go in person to the lands to be divided, and there, in presence of the parties, (if they appear on summons to be made,) by the oaths of those twelve men, to make an equal and fair partition, and allot to each party their

(a) *Eustace v. Scawen*, Cro. Jac. 696. Tit. 35, c. 12. Tit. 32, c. 9.

(b) Lit. § 290. 1 Inst. 169, a. 187.

(c) 1 Inst. 169, a.

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<sup>1</sup> As to the mode of making partition in the United States, see *post*, tit. 20, § 38, note. See also, 4 Kent, Comm. 364—366.

full and just share, and then return the inquisition of the partition annexed to the writ, under the seals of the sheriff and the jurors; whose names are likewise to be returned. (a)

33. When the inquisition is thus returned, on motion made to the Court, the second judgment is given in this manner:—*Ideo consideratum est per Curiam, quod partitio firma et stabilis in perpetuum teneatur.* (b)

34. In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ is directed to the sheriff to make partition, no writ of error lies; because the judgment is not complete till the sheriff's return and the second judgment which the law requires; for, before that, the plaintiff may be nonsuited. Or he may, upon the return of the sheriff, suggest to the Court that the partition is not equal, and so, have a new partition; and may also release before the last judgment. (c)

35. If, after awarding the judicial writ, and before the return of it, the defendant dies; yet the partition is good, and the writ shall not abate; because, before the death of the defendant, judgment ought to be given that partition should be made; and though, upon the return of the judicial writ, there is another judgment given, yet that is in confirmation of the first judgment. It seems, likewise, that upon the return of the judicial writ, no exception can be taken to it; therefore it is not material whether the defendant be dead or alive then, since he can have no advantage by any plea on the return of the writ. (d)

\*36. If the writ be brought by one joint tenant against \*386 several, and there happen to be error in the execution of it, and one of the defendants releases all errors to the plaintiff, this shall not bar the others; for each having a distinct interest, shall not be prejudiced by the release of his companion. (e)

37. In this writ of partition may be demanded the view of frankpledge, together with a manor; for though it be not severable of itself, nor partible, yet the profits thereof may be divided: or it may be divided thus; that the one shall have it at one time, and the other at another; also, being demanded within the manor,

(a) Booth's Real Act. 244. Lit. § 248.

(c) Berkeley v. Warwick, Cro. Eliz. 635.

(e) Yate v. Windham, Cro. Eliz. 64.

(b) 1 Inst. 169, a.

(d) Cro. Eliz. 636. Dal. 59.

it may be well entirely allotted to one, and the land in recompense to another. (a) <sup>1</sup>

388 \*      \* 38. The courts of common law [of late years have been] seldom resorted to for obtaining partitions of estates held in joint tenancy. For the *Court of Chancery*, ever since the reign of Queen Elizabeth, has *entertained suits for partition*; upon the ground, that if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in the courts of law; and where the tenants in possession are seised of  
389 \*      particular \* estates only, the persons in remainder are not bound by the judgment. (b) <sup>2</sup>

39. A joint tenant may therefore now file a bill in the Court of Chancery, praying for a partition of the estate; in which case the Court will issue a commission to certain persons for that purpose, who may proceed to divide the estate without a jury, and make their return to the Court. If not objected to by any of the parties, the Court will decree the performance of such partition, and direct the parties to execute proper conveyances to each other of the shares allotted to them. (c)

40. Lord Hardwicke has said, that where a bill is brought in the Court of Chancery, to have a partition between two joint tenants, or tenants in common, the plaintiff must show a title to himself in a moiety, and not allege generally that he is in possession of a moiety; and this is stricter than a partition at law, where seisin is sufficient. The reason is, because in Chancery conveyances are directed, and not a partition only; which makes it discretionary, whether where a plaintiff has a legal title, they will grant a partition or not; and where there are suspicious circumstances in the plaintiff's title, the Court will leave him to law. (d) <sup>3</sup>

(a) *Moor v. Onslow*, Cro. Eliz. 759.

(b) *Mitford's Plead.* 397. 1 Inst. 169, a, n. 2 Ves. jun. 124. 17 Ves. 562. 1 V. & Bea. 553, et seq. (*Castleman v. Veitch*, 3 Rand. 508.)

(c) Amb. R. 286, 589. *Calmady v. Calmady*, 2 Ves. jun. 568. 17 Ves. 538.

(d) *Cartwright v. Pulteney*, 2 Atk. 380.

<sup>1</sup> Writs of partition were abolished in England, by statute 3 & 4 Will. 4, ch. 27. But in the United States this remedy is still in force. See *post*, tit. 19, § 20, &c.

<sup>2</sup> On the jurisdiction of Courts of Chancery, in cases of partition, and the principles and manner of its exercise, see 1 Story on Eq. Jur. ch. 14, § 646—658; Allnatt on Partition, ch. 4.

<sup>3</sup> If the legal title is clear and without suspicion, the remedy for partition in

41. Sir W. Blackstone says, *if two joint tenants agree to part their lands, and hold them in severalty*, they are no longer joint tenants in equity; for they have no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason also the right of survivorship is, by such separation, destroyed. (a)

42. In a modern case, in which the question was, whether persons taking a residue as executors, took as joint tenants; Lord Thurlow said: "If in fact they were joint tenants,—could their having joined in an answer, that it was a tenancy in common, have the operation of a severance? A note certainly would do it, because a joint tenancy may be severed by any contract; and if they said in their answer that they agreed so to do, I should construe them to have done a sufficient act to sever." (b)

43. It should, however, be observed that an *agreement of this kind must be in writing*, and would *only operate in equity*; and that the legal estate would still be held in joint tenancy.

44. An agreement by the husbands of two joint tenants to \* make partition, with a partition made under such \* 390 an agreement, will not bind the inheritance of the wives.

45. Mary and Susan Jackson being joint tenants in fee of certain copyhold lands, and being both married, the husbands, by mutual agreement, made a partition of the premises between themselves and the heirs of Mary and Susan, by which each of them agreed to take one part thereof, which each of them did, and entered into possession. Susan held a share of the premises so divided by virtue of such partition, and Mary enjoyed her part till her death; and Mary's share being at the time of the partition somewhat larger than Susan's, in consideration thereof Mary paid the taxes charged upon both. A bill was brought by the heir of Mary to confirm the division, and that the defendant Susan might be restrained from proceeding at law against the plaintiff, to compel a new partition thereof. Lord Hardwicke said, that where there had been a long possession under an

(a) 2 Bl. Comm. 185.

(b) Trewen v. Relfe, 2 Bro. C. C. 220.

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equity is as much a matter of right, as at law. 1 Story, Eq. Jur. § 653; Wiseley v. Findlay, 3 Rand. 361; Straughtan v. Wright, 5 Rand. 493; Baring v. Nash, 1 Ves. & Bea. 555.

agreement for owelty of partition, the Court was strongly inclined to quiet the enjoyment of such estates; and he was at first of opinion to establish the agreement, but it appeared that it was only an agreement between the husbands, which could by no means bind the inheritance of the two wives; for the argument of long enjoyment was of no force, unless it had been originally the agreement of the wives. His Lordship further observed, that if a joint tenant, upon a partition, thought proper to accept of a contingent uncertain advantage, where one moiety of the land was of superior value to the other, it would not vacate the agreement. (a)

46. The last mode by which an estate in joint tenancy may be destroyed, is by the *devolving of all the shares on one of the joint tenants, by survivorship*; by which he acquires an estate in severalty. †

(a) *Ireland v. Rittle*, 1 Atk. 541. See Co. Lit. 171, a, note 2. *Vide tit. 19 and 20.*

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† [The statute of 1 Will. 4, c. 60, which authorizes the conveyance of mortgage and trust estates vested in infant and lunatic mortgagees or trustees, does not extend to cases of partition, § 18. But the statute 1 Will. 4, c. 65, § 27, which relates to property belonging to infants and lunatics beneficially, authorizes the completion of contracts entered into by persons subsequently becoming lunatic.]



## TITLE XIX.

## COPARCENARY.

## BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 12.

KENT'S COMMENTARIES. Vol. IV. Lect. 64.

FLINTOFF on Real Property. Vol. II. Book I. ch. 5, § 3.

COKE upon LITTLETON, fol. 163, a.—180, a.

PRESTON on Abstracts of Title. Vol. II. p. 68—75.

LOMAX'S DIGEST. Vol. I. tit. 16.

ALLNATT on Partition.

SECT. 1. *How this Estate arises.*3. *Properties of Coparceners.*7. *The Possession of one is that of the other.*10. *Subject to Curtesy and Dower.*11. *Destroyed by Alienation.*SECT. 12. *By voluntary Partition.*20. *By Writ of Partition.*26. *What may be divided by it.*28. *By Partition in Chancery.*29. *Incidents after Partition.*33. *By Descent to one of them.*

SECTION 1. An *estate in coparcenary* arises, where a person seised of lands and tenements in fee simple, or in tail, dies *leaving only daughters, sisters, aunts, or other female heirs*; in which case the estate descends to all such daughters, sisters, &c., jointly; when they are called coparceners, and are said to hold in coparcenary, and to *make but one heir* to their ancestor. (a) <sup>1</sup>

2. An estate in coparcenary also frequently arises in consequence of *gavelkind* and other *customary descents to all the male children*, in which they are *coparceners*. Hence, Littleton says that coparceners may be, either by the *common law*, or by *custom*. (b)

3. The *properties of coparceners* are in some respects like those

(a) Lit. § 241, 242.

(b) Lit. § 241, 242.

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<sup>1</sup> In the United States, as lands descend to all the children, equally, there can be no substantial difference between coparceners and tenants in common; and even the technical distinction between them may be considered as essentially abolished. In some of the States, all estates holden by more than one person, are expressly declared to be tenancies in common; and where it is not so declared, the effect is the same. See 4 Kent, Comm. 367; *ante*, tit. 18, ch. 1, § 2, note; *post*, tit. 29, ch. 3. [In Maryland, the children of parents who die intestate, seised in fee of lands, &c., take as coparceners. *Hoffar v. Dement*, 5 Gill. 132.]

of joint tenants; for they have the same *unities of interest, title, and possession*: and, as they make but one heir, they have one entire freehold in the land, in respect to the *præcipe* of a stranger. (a)<sup>1</sup>

4. In many other points, however, coparceners differ materially from joint tenants. First, they *always claim by descent*, whereas joint tenants always claim by purchase.

Thus Littleton says, if sisters purchase lands or tenements, they are joint tenants thereof, not coparceners. Hence it likewise follows that no estates can be held in coparcenary but such as are of a descendible nature, whereas it has been stated that estates for life and years may be held in joint tenancy. (b)

5. No unity of time is necessary to an estate in coparcenary; for if a man has two daughters to whom his estate descends, and one dies leaving issue a son, such son and the surviving daughter, and when both the daughters are dead their two heirs, will be coparceners, though the estates vest in them at different times. (c)

6. Coparceners, though they have an unity, have not an *entirety of interest*; for between themselves, to many purposes, they have, in judgment of law, several freeholds. They are properly entitled, each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship, between them; for each part descends severally to their respective heirs, though the unity of possession continues. (d)

7. The possession of one coparcener † is, at the common law, the possession of the other; the entry of one coparcener generally is also accounted in law the entry of both, and no divesting of the moiety of the other.<sup>2</sup> But Lord Coke says, where one coparcener enters specially, claiming the whole land, and taking the

(a) 1 Inst. 163, b. 169, a. (b) Lit. § 264. (c) 1 Inst. 164, a. (d) Ib. 2 Bl. Comm. 188.

<sup>1</sup> Parceners have, in equity, the same mutual remedies for an account of rents and profits, as joint tenants and tenants in common have, though they are not mentioned in the statute of 3 & 4 Ann. See *ante*, tit. 18, ch. 1, § 64, note; 4 Kent, Comm. 366; note; 2 Com. Dig. p. 325, 540, Chancery, 2 A 1; Ib. 3 V 6; 1 Story, Eq. Jur. § 466; 2 Greenl. on Evid. § 34—39. [See *Hoffar v. Dement*, 5 Gill, 132.]

<sup>2</sup> See *Purcell v. Wilson*, 4 Gratt. 16; *Gill v. Fauntleroy*, 8 B. Mon. 177.]

[† By the 12th section of the statute of 3 & 4 Will. 4, ch. 27, it is enacted that the possession of one of several coparceners, joint tenants, or tenants in common, shall not be deemed the possession of the others. *Vide supra*, title 18, ch. 1, § 26.]

whole profits, she gains one moiety, namely, that of her sister by abatement; and yet her dying seised shall not take away the entry of her sister.

In a note to this passage, taken from Lord Nottingham's manuscripts, it is said—"The contrary is held; that one coparcener cannot be disseised without actual ouster; and claim shall not alter the possession;" and the case of *Smals v. Dale*, which will be stated in the next title, was cited. (a)

8. Where both coparceners are actually seised, Lord Coke says, the *taking of the whole profits, or any claim made by the one cannot put the other out of possession*, without an actual putting out or disseisin; but if one coparcener enters, claiming the whole, and makes a feoffment in fee, and takes back an \*estate to her and her heirs, and hath issue, and dies \*393 seised, this descent shall take away the entry † of the other sister; because, by the feoffment, the privity of the coparcenary was destroyed.<sup>1</sup> And this doctrine was admitted in the following case. (b)

9. In a writ of error from the Court of King's Bench in Ireland to that of England, the case was, that Maurice Tyrrell, being a Roman Catholic, died seised of certain land, leaving two sons, Richard and James. By the Irish statute, 2 Ann., estates in fee simple and fee tail, belonging to Roman Catholics, descended to all the sons, as if the lands were held in gavelkind; on the death of Maurice, his eldest son Richard entered alone, held the same for sixty-two years, till his death; and in the meantime settled the same by fine and recovery, to which James his brother, was privy. On the death of Richard, in 1766, leaving two daughters, James, the lessor of the plaintiff, brought an ejectment against his two nieces, for two thirds of the moiety of the lands, whereof his brother died seised, as co-heir in gavelkind, with his brother; the other third being assigned to the widow of Richard for her dower.

(a) 1 Inst. 243, b. u. 1, 373, b. (Hob. 120. *Post*, tit. 20, § 15.)

(b) 1 Inst. 373, b. *Vide supra*, tit. 18, § 26. 1 Inst. 243, b.

† [By statute 3 & 4 Will. 4, c. 27, § 39, it is enacted that no descent cast, discontinuance, or warranty, which shall happen after the 31st of December, 1833, shall toll or defeat any right of entry or action for the recovery of land.]

<sup>1</sup> As to the effect of a descent cast, and how far it is taken away by statutes, see *post*, tit. 29, ch. 1, § 7, note.

On the trial, the Judge directed the jury to find a verdict for the plaintiff; upon which a bill of exceptions was tendered, setting out in substance this case, which was returned into the King's Bench in Ireland; and thereupon the Court gave judgment for the defendants. A writ of error was then brought in the Court of King's Bench at Westminster; and it was argued for the defendants, that sixty-two years' sole possession, and the fine, were a bar to this action by the common law; that this was a question, not between joint tenants or tenants in common, but tenants in gavelkind, who were coparceners; and that the true state of the law was this: 1. If both enter, there must be an actual ouster to make a disseisin; 2. If one enters generally, and takes the profits, this is no disseisin; 3. If one enters specially, as in the present case, claiming right to the whole, and taking the whole profits, this is a disseisin; but after his death, the other may enter, unless barred by the Statute of Limitations; 4. If, after a special entry, one by feoffment or fine

394 \* destroys the coparcenary, and takes back an estate in fee, and dies, the entry of the other is barred. Here Richard entered alone in 1704; took the whole profits; settled the estate in 1727, with the privity of James, by a fine; and died, after having been sixty-two years in possession. The entry of James was therefore clearly barred, and he could not maintain an ejectment.

The Court said, that the statute 2 Ann. made the lands of Roman Catholics descend in gavelkind; that was its whole effect; and then the adverse possession of one gavelkind tenant would not operate as the possession of both. That was a qualified rule; and in the present case the acts of ownership, fine, &c. made an actual ouster; so that the Statute of Limitations barred the plaintiff. (a)

10. *Curtesy and dower are incident to estates held in coparcenary*; as no survivorship takes place, each share descending to the heir of the respective coparceners. But in such a case, dower can only be assigned in common; for the widow cannot have it in a different manner from her husband. (b)

11. *Estates in coparcenary may be destroyed by the alienation*

(a) *Davenport v. Tyrrell*, 1 Black. R. 675. *Coppinger v. Keating*, tit. 20. Tit. 31, c. 2.

(b) Tit. 6, c. 8.

of one of the coparceners to a stranger, which disunites the title, and may disunite the interest; and the lands cease to be held in coparcenary, [as to the share so conveyed, where there are three or more coparceners.] (a)

12. Estates in coparcenary may be *destroyed by partition*, which disunites the possession; and Littleton mentions *four sorts* of voluntary partitions. The *first* is where coparceners agree to make partition, *and do make partition* of the tenements, so that each takes a particular part in severalty.

13. Lord Coke has observed upon this section, that if coparceners make partition at full age, and unmarried, and of sane memory, of lands in fee simple, it is good and firm forever, though the values be unequal. But if it be of lands entailed, or if any of the parceners be of nonsane memory, it shall bind the parties themselves, but not their issues, unless it be equal.<sup>1</sup> If any be covert, it shall bind the husband, but not the wife, or her heirs; if any be within age, it shall not bind the infant. (b)

14. The *second* mode of voluntary partition is, where the coparceners *agree to choose some friend to divide the lands*; in \* which case the eldest daughter shall choose first, and \* 395 the other daughters according to their seniority. (c)

15. The part which the eldest takes by virtue of her priority of age is called *enitia pars*.<sup>2</sup> It is a respect paid to age, and merely honorary, for it does not descend to her issue, but the next eldest sister shall have it; whereas all those privileges which the law gives to the eldest sister, that are beneficial to her, descend to her issue, and even go to her assignee. (d)

16. The *third mode* of voluntary partition is, *where the eldest makes the division* of the lands; in which case she shall choose

(a) Co. Lit. 175, u. *Infra*, § 22.

(b) 1 Inst. 166, a.

(c) Lit. § 244.

(d) Lit. § 245.

<sup>1</sup> Partition by persons of nonsane memory, is binding on them only as their contracts are binding; namely, they are valid if fair and equal; but if otherwise, they may be avoided. Fitzh. N. B. 202, D.; 2 Bl. Comm. 291, 292; 1 Bac. Abr. 697. And see 2 Greenl. on Evid. § 369; Stock. on Non Compotes Mentis, p. 25—30. [See Snowden v. Dunlany, 11 Penn. State Rep. (1 Jones,) 522; Matter of Latham, 6 Ired. Eq. 406.]

<sup>2</sup> This word, says Lord Coke, is called in old books *æisinitia*, which is derived of the French word *eisne*, for *eldest*. 1 Inst. 166, b. [See Wilhelm v. Wilhelm, 4 Md. Ch. Decis. 330.]

last; for Lord Coke says, the rule of law is, *cujus est divisio, alterius est electio*; for avoiding partiality. (a)

17. The *fourth mode* of voluntary partition is, *to have the lands divided*, and then the *sisters to draw lots* for their shares. And Lord Coke observes that in this kind of partition coparceners *fortunam faciunt judicem*.

18. Lord Coke also observes that there are other partitions in deed besides those here mentioned; for a partition between two coparceners, that the one shall have and occupy the land from Easter until the 1st of August in severalty, and the other shall have and occupy the land from the 1st of August till Easter, yearly to them and their heirs, is a good partition. Also, if two coparceners have two manors by descent, and they make partition, and the one shall have one manor for one year, and the other the other manor for that year, and so *alternis vicibus* to them and their heirs; this is a good partition. The same law is, if a partition be made for two or more years, and each coparcener has an estate of inheritance, and no chattel; albeit either of them, *alternis vicibus*, has the occupation but for a certain term of years. (b)

19. These partitions might formerly have been made by parol only, without deed or livery; but in consequence of the Statute of Frauds, 29 Cha. II. c. 3, *no legal partition* can now be made between coparceners *without deed*. But an *agreement in writing* to make a partition, will have the *same effect in equity* as an actual partition at law. (c)

20. Where coparceners could not agree upon any of the preceding modes of partition, any one or more of them might bring a *writ of partition* against the others or other of them; 396\* and when \*judgment was given upon this writ, that a partition should be made between the parties, the sheriff and jury made a division of the lands, in the same manner as between joint tenants, not making mention in the judgment of the elder sister more than of the younger (d)

21. At *common law*, the writ of partition lay for one coparcener, tenant of the freehold, against the other, and against the alienee of such coparcener; but it *lay not for the alienee*, nor for

(a) Lit. § 245.

(b) 1 Inst. 167, a.

(c) Lit. § 250. (4 Hen. & Munf. 19.) Tit. 18, c. 2.

(d) Lit. § 247, 248. Tit. 18, c. 2, § 30.

the *tenant by the curtesy*. And if one coparcener had made a lease for life, she could not afterwards bring a writ of partition during the continuance of that estate. (a) <sup>1</sup>

22. If there were three coparceners, and the eldest purchased the part of the youngest, yet she should have a writ of partition at common law against the middle sister; for though she had one part by purchase, yet this did not strip her of her character of a coparcener. It was a stronger case where there were three coparceners, and the eldest took a husband, who purchased the share of the youngest. The husband was a stranger, and no coparcener; yet he and his wife should have a writ of partition against the middle sister, at the common law; because he was seised of one part in right of his wife, who was a parcener.

23. A *tenant by the curtesy* might have a writ of partition upon the Statute 32 Hen. VIII.; for although he was neither joint tenant nor tenant in common, (for that a *præcipe* lay against the parcener and tenant by the curtesy,) yet he was in equal mischief as another tenant for life. (b)

24. The proceedings under a writ of partition were somewhat altered by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, and still more by the statutes 8 & 9 Will. III. c. 31, † all of which extended to coparceners; and have been stated in the preceding title.

25. It has been held, in a modern case, that the statutes respecting partitions, do not extend to copyhold estates. (c)

26. *All lands and other real property, which are capable of a division, must be divided upon a writ of partition, and set out by \*metes and bounds.* Castles used for the necessary \*397 defence of the realm, or which were the heads of earldoms or baronies, were allotted to the eldest sister; but *castles for habitation* and private use, and *houses*, may be divided among coparceners. (d)

(a) 1 Inst. 175, a.

(c) Burrell v. Dodd, 3 Bos. & Pul. 378.

(b) 1 Inst. 175, a.

(d) 1 Inst. 164, b. Tit. 26, c. 1.

<sup>1</sup> As to the mode of partition in the United States, see *post*, tit. 20, § 38, note.

The proceedings by writ at common law are fully treated in Allnatt on Partition, ch. 3.

† [But the Writ of Partition is abolished from the 1st June, 1835, by statute 3 & 4 Will. 4, ch. 27, § 36, 37. See also, § 38.]

27. There are several kinds of incorporeal hereditaments which *cannot be divided* among coparceners; they were, therefore, *allotted to the eldest sister*, and the *others* had an *allowance* out of the rest of the inheritance; but where *nothing else descended*, then it was agreed that *each* coparcener should *have them for a certain time*. (a)

28. Partitions between coparceners are now usually made by means of a *bill in Chancery*,<sup>1</sup> in the same manner as partitions between joint tenants; and partitions may also be made by the commissioners of an inclosure act. (b)

29. Though the law gives to every coparcener a power to sever her own moiety or share, and to carry it to the family into which she marries; yet since the partition is compulsory, the law will not put coparceners in a worse condition, after partition, than if they had enjoyed their shares in coparcenary; therefore, in a *suit commenced* for any part, or on *eviction of any part*, they shall have *like remedy* as if they had *enjoyed in common*; in which case, if a *suit* had been commenced, *both parties* must have been impleaded; and on a *recovery*, there had been an *equal loss to both*. (c)

30. There is, therefore, after partition, a *warranty annexed to each part*; so that if either be impleaded, she may vouch her sister; and if she loses, she may recover one moiety of her loss in value against the other sister. For there is a condition annexed to every partition, that if either the whole, or any share, or an estate for life, or in tail thereout, be evicted, the party so evicted may enter on her sister's moiety, and avoid the partition of an undivided moiety of what is left. (d)

31. If two houses descend to two coparceners, one worth twenty shillings a year, and the other only worth ten shillings a year, each coparcener upon a partition shall have a house; but she who has the house worth twenty shillings a year, shall pay to the other, and her heirs, five shillings a year, that the partition may be equal; and distress may be of common right, into whose hands soever the house goes. (e)

(a) 1 Inst. 164, b. 165, a.

(b) Tit. 18, c. 2, § 42. Tit. 20.

(c) 1 Inst. 173.

(d) Idem. Tit. 32, c. 25.

(e) Lit. § 251, 252.

<sup>1</sup> As to partition by bill in Chancery, see 1 Story on Eq. Jur. ch. 14, § 646—658; Allnatt on Partition, ch. 4.



\* 32. This kind of rent is called a *rent for owelty or* \* 398  
*equality of partition*, and might formerly have been  
granted without deed ; and where a rent of this kind is granted  
generally, it shall issue out of the grantor's share, and shall go in  
coparcenary. (a)

33. Estates in coparcenary are also destroyed by *the whole* at  
last *descending to one* of the coparceners, which brings it to an  
estate in severalty.

(a) 1 Inst. 169, b.

## TITLE XX.

## TENANCY IN COMMON.

## BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 12.

KENT'S COMMENTARIES. Vol. IV. Lect. 64.

COKE upon LITTLETON, fol. 188, b.—200, b.

FLINTOFF on Real Property. Vol. II. Book I. ch. 5, § 3.

PRESTON on Abstracts of Title. Vol. II. p. 75—78.

LOMAX'S DIGEST. Vol. I. Tit. XVII.

ALLNATT on Partition.

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| SECT. 1. <i>Description of.</i><br>3. <i>How created.</i><br>8. <i>Incidents to this Estate.</i><br>14. <i>The Possession of one is that of the other.</i><br>21. <i>Subject to Curtesy.</i><br>23. <i>And to Dower.</i><br>26. <i>[As to Dower, with Respect to Real Estate being Partnership Property.]</i> | SECT. 30. <i>Destroyed by Voluntary Partition.</i><br>31. <i>By Writ of Partition.</i><br>34. <i>By Partition in Chancery.</i><br>38, n. <i>By Partition under an Inclosure Act.</i><br>39. <i>By uniting all the Titles.</i> |
|---|---|

SECTION 1. A *tenancy in common* is where *two or more persons hold lands or tenements* in fee simple, fee tail, or for term of life or years, *by several titles*; not by a joint title; and occupy the same lands or tenements in common; from which circumstance they are called tenants in common, and their estate a tenancy in common. (a)

2. The *only unity* required between tenants in common is that of *possession*. For one tenant in common may hold his part in fee simple, the other in tail, or for life; so that there is no unity of interest. One may hold by descent, the other by purchase; or the one by purchase from one person, and the other by purchase from another; so that there is no unity of title. One's estate may have been vested fifty years, the other but yesterday; so that there is no unity of time. (b)

3. A tenancy in common may be *created by the destruction of*

(a) Lit. § 292. 1 Inst. 190, b.

(b) 2 Bl. Comm. 191.

*an estate in joint tenancy or coparcenary.* Thus Littleton says, if a man enfeoffs two joint tenants in fee, and one of them enfeoffs a stranger of his share, the alienee and the other joint tenant are tenants in common. (a)

\*4. So, if two persons have an estate in coparcenary, \*400 and one of them alienes his share to a stranger, the alienee and the other coparcener become tenants in common. (b)

5. It has been stated in a preceding title, that where lands are given to two men, and the heirs of their bodies, they have a joint estate for their lives, and several inheritances; so that they are joint tenants for life, and tenants in common in tail, of the inheritance. (c)

6. If lands be given to John, Bishop of Norwich, and his successors, and to John Overall, Doctor of Divinity, and his heirs, being one and the same person, he is tenant in common with himself (d)

7. A tenancy in common may also be created by express limitations in a deed or will, of which an account will be given hereafter. (e) <sup>1</sup>

8. Tenancies in common *descend to the heirs of each* of the tenants, because they have several freeholds, and not an entirety of interest, like joint tenants; therefore there is *no survivorship* among them.

9. By the old law, tenants in common had no remedy against each other for the rents of the estate; but by the statute 4 & 5 Ann. c. 16, s. 27, *actions of account* are maintainable by tenants in common against each other, in the same manner as by joint tenants; and by the statute of Westm. 2, ch. 22, they have the same remedies against each other, in cases of *waste*, as joint tenants. (f) <sup>2</sup>

(a) Lit. § 292—299.

(b) Id. 309.

(c) Tit. 18, c. 1, § 7.

(d) 1 Inst. 190, a.

(e) Tit. 32 & 38.

(f) Tit. 18, c. 1, § 64, 65.

<sup>1</sup> [Where land is demised to be cultivated on shares, the parties are tenants in common of the crop until the division is made. *Dinehart v. Wilson*, 15 Barb. Sup. Ct. 595; *Tripp v. Riley*, Ib. 333; *Thompson v. Mawhinney*, 17 Ala. 362; *Strother v. Butler*, Ib. 733; *Smith v. Tankersley*, 20 Ala. 212; *Aiken v. Smith*, 21 Vt. (6 Washb.) 172; *Ferrall v. Kent*, 4 Gill. 209.]

<sup>2</sup> [By the new code of *Missouri*, (1849,) one tenant in common may sue another in the ordinary form of action, and it is not necessary to resort to the action of account, *Rogers v. Penniston*, 16 Mis. (1 Bennett,) 432. One tenant in common may sue in *assumpsit* his co-tenant, who has received the rents and profits, for his share thereof.

10. If two tenants in common be of a dove-house, and the one *destroy* the old doves, whereby the flight is wholly lost, the other tenant in common shall have an *action of trespass*; <sup>1</sup> for the whole flight is destroyed, therefore, he cannot, in bar, plead tenancy in common. So it is if two tenants in common be of a park, and one *destroys* all the deer, an action of trespass lies. (a)

11. It was held in Trin. 6 Eliz., by Dyer and Weston, that if there be two tenants in common of a wood, and *the one leases his part to the other* for years, if the lessee cuts down trees and

(a) 1 Inst. 200, a. (2 Greenl. on Evid. § 615, and cases there cited.)

Buck v. Spofford, 31 Maine, (1 Red.) 34. To support such action, it must appear that the defendant has received more than his share, not merely of a single article of produce, but of the entire profits of the estate, after deducting all reasonable charges; and that the balance is due to the plaintiff, and not to other co-tenants. Shepard v. Richards, 2 Gray, 424. And the mortgagee of a tenant in common who has entered to foreclose, may have such action. Shepard v. Richards, *ubi supra*. See also Wilbur v. Wilbur, 13 Met. 404; Woolever v. Knapp, 18 Barb. Sup. Ct. 265.]

<sup>1</sup> Trespass will lie for one tenant in common against another, for any act of permanent injury to the inheritance, such as making pits in the land, digging turves, and the like, when not done in the lawful exercise of a right of common. Wilkinson v. Hagarth, 11 Jur. 104. And it seems that trover also will lie for a chattel, where the appropriation of it by one tenant in common is such as finally, by its nature, to preclude the other party from any future enjoyment of it. See 2 Greenl. on Evid. § 646, note (s), and cases there cited.

[A tenant in common with others of a meeting-house may maintain trespass for injuring one of the pews, against a person having no title either in the pew or in the house. Murray v. Cargill, 32 Maine, (2 Red.) 517. One tenant in common has no right by means of a dam erected on other land of which he is sole seised, to flow the land held in common without the consent of his co-tenants, and the co-tenants may bring suit therefor. Great Falls Co. v. Worcester, 15 N. H. 412. A tenant in common may have assumpsit against his co-tenant, for his share of the damages caused by cutting timber; and this, although he has alienated his interest in the land after the cutting, and before he brought suit. Blake v. Milliken, 14 N. H. 213.

One tenant in common in possession is not liable in trover by his co-tenant, for his portion of the crop grown on the land, but he must account to his co-tenant for the rents and profits. Keisel v. Earnest, 21 Penn. (9 Harris,) 90. If some of several co-tenants permit one co-tenant to enter upon the premises held in common, no terms being fixed, such co-tenant is not thereby made tenant from year to year, but is only tenant at will of those co-tenants granting the permission, and of their shares. Keisel v. Earnest, 21 Penn. (9 Harris,) 90.

Where there is an actual ouster, a tenant in common can bring ejectment. Johnson v. Swain, Busbee Law, (N. C.) 335. And see Hammett v. Blount, 1 Swan, (Tenn.) 385. One tenant in common may sustain trespass to try title against a stranger. Croft v. Rains, 10 Texas, 520. See also Tripp v. Riley, 15 Barb. Sup. Ct. R. 333. One tenant in common cannot, unless authorized by them, execute a lease which will bind his co-tenants—Mussey v. Holt, 4 Foster, (N. H.) 248—nor discharge a claim upon the land. Allen v. Woodward, 2 Ib. 544. One tenant in common, who has leased to his co-tenant, may distrain for the rent. Luther v. Arnold, 8 Rich. (S. C.) 24.]

does *waste*, he will be punished for a *moiety of the waste*, and the lessor may *recover* a moiety of the place wasted. (a)<sup>1</sup>

12. One tenant in common cannot, however, maintain an action on the case, in the nature of waste, against another \*tenant in common, in possession of the whole, under a \*401 demise of his companion's moiety, for cutting down trees of a *proper age and growth* for being cut.

13. In an action on the case, in the nature of waste, it appeared that the plaintiff and defendant were tenants in common of land, on which were several trees, growing; that the defendant occupied the whole, having a demise from the plaintiff of his moiety; and that he had felled many trees, all of which were of a proper age to be cut down.

The Judge directed a verdict to be taken for the plaintiff, for the value of half the trees, with leave for the defendant to set it aside, if the Court should be of opinion that the action could not be maintained.

On a motion to enter a verdict for the defendant, Lord Kenyon said, the verdict had neither principle nor authority for \*its support. The defendant could not be in a worse \*402 situation, by being tenant to the plaintiff of his moiety, than he would have been in, if the plaintiff had not demised to him; and, considered in that point of view, the action could not be supported. This was an action *ex delicto*; if one tenant in common misused that which he had in common with another, he was answerable to the other, in an action, as for misfeasance. But here it did not appear that the defendant committed any thing like waste; no injury was done to the inheritance, no

(a) Moo. 71, pl. 164.

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<sup>1</sup> [In general, equity will not interfere between tenants in common to restrain waste, on the ground that one tenant in common has a right to enjoy as he pleases, and that the party complaining may relieve himself at law by having partition, and the Court will not act against the legal title to possession of a tenant in common. The Court will, however, restrain a tenant in common in some special cases of waste, and under peculiar circumstances. So also injunctions will be granted in special cases to prevent an inequitable exercise of the legal rights, which every tenant in common possesses; and courts of equity uniformly interfere, when one tenant in common is committing acts, which, if permitted to go on, would amount to a destruction of the property. Courts of Equity will not refuse their aid to protect the common estate from total ruin by a tenant in common. *Ballou v. Wood*, 8 Cush. 52. See, also, *Obert v. Obert*, 1 Halst. Ch. (New Jersey,) 397.]

timber was improperly felled; the defendant only cut those trees that were fit to be cut; and if he were liable in such an action as this, it would have the effect of enabling one tenant in common to prevent the other's taking the fair profits of the estate. In another form of action the plaintiff would be entitled to recover a moiety of the value of the trees that were cut. Verdict for the defendant. (a)

14. The *possession and seisin of one tenant in common is the possession and seisin of the other*,† because such possession is not adverse to the right of his companion, but in support of their common title.<sup>1</sup> And although one tenant in common *takes the whole profits*, yet this *does not divest* the possession of his companion.<sup>2</sup> But if one tenant in common should *drive off* the cattle of his companion from the land, or *prevent him from entering* upon and occupying the land, this would divest the possession, so as to entitle the companion to bring an ejectment. (b)<sup>3</sup>

(a) *Martin v. Knowllys*, 8 Term R. 145.

(b) 1 Inst. 199, b. Cro. Eliz. 641.

† [Now otherwise by statute 3 & 4 Will. 4, c. 27, § 12, *supra*, tit. 18, ch. 1, § 26.]

<sup>1</sup> See, accordingly, *Barnard v. Pope*, 14 Mass. 434; *Brown v. Wood*, 17 Mass. 68; *Shumway v. Holbrook*, 1 Pick. 114; *Catlin v. Kidder*, 7 Verm. 12; *Jackson v. Tibbits*, 9 Cowen, 241; *McClung v. Ross*, 5 Wheat. 116; *Knox v. Silloway*, 1 Fairf. 201; *Parker v. Proprietors of Locks, &c.*, 3 Met. 99; *Taylor v. Cox*, 2 B. Monr. 429; *Thomas v. Hatch*, 3 Sumn. 170; *Clymer v. Dawkins*, 3 How. S. C. Rep. 674; *Colburn v. Mason*, 12 Shepl. 434; [*Small v. Clifford*, 38 Maine, (3 Heath,) 213. *Buckmaster v. Needham*, 22 Vt. (7 Washb.) 617; *Cunningham v. Roberson*, 1 Swan, (Tenn.) 138.]

<sup>2</sup> See *Lloyd v. Gordon*, 2 H. & McHen. 254; *Willison v. Watkins*, 3 Pet. 51; *Chambers v. Chambers*, 3 Hawks, 232; [*Wass v. Buckman*, 38 Maine, (3 Heath,) 356; *Johnson v. Toulmin*, 18 Ala. 50.]

<sup>3</sup> It is well settled that one tenant in common may disseise another. The nature of a disseisin, and what acts amount to it, have already been shown. See *ante*, Vol. I. tit. 1, § 34, note (3). But acts of ownership are not, in tenancies in common, necessarily acts of disseisin. It depends on the intent with which they are done, and their notoriety. The law will not presume, without evidence, that any man intends to do an unlawful act; but will presume that every man, having a right of entry or possession, enters or occupies according to his title; and of course it presumes that those acts, which, if done by a stranger, would *per se* be a disseisin, are, when done by a tenant in common, susceptible of explanation, consistent with his legal title. The question, therefore, of ouster of one tenant in common by another, is a question of *intention*, to be found by the jury, from the *overt acts*, proved in the case. See *Prescott v. Nevers*, 4 Mason, 330; *Parker v. Proprietors of Locks, &c.*, 3 Met. 99. The acts themselves must be such as, if done by a stranger, would be acts of disseisin; and must be shown to have been done adversely to the right of the co-tenant, and with intent to oust him and to assert the actual and exclusive ownership of the entirety. Thus, an ouster has

15. Lord Hobart reports it to have been laid down by the Court of Common Pleas, in 12 James, that the entry of one tenant in common might be in three ways; either in the name of herself or her fellow; or, generally, which shall always be taken according to right, as being under construction of law, and, therefore, lawful; or, lastly, entry claiming all expressly; which cannot dispossess her fellow; for her possession is over all lawful, as well before as after such claim; so that there is no possession altered by such claim. Then a sole claim without more can never change the possession; and without a change of possession it remains as before. From which it follows, that a tenant in \*common can *never be disseised by his* \*403 *fellow, but by an actual ouster.* (a)

(a) Smals v. Dale, Hob. 120. 1 Salk. 892. 2 Salk. 423.

been proved by evidence that the party refused to suffer his companion or his agent to enter, and denied his title, retaining the exclusive possession. *Bracket v. Norcross*, 1 Greenl. 89. So, where one entered, claiming title to the entirety under a deed which was defective as to a moiety; it was held a disseisin as to that moiety. *Prescott v. Nevers*, *supra*. So, where one tenant in common, in possession, refused rent demanded by the other, and claimed the whole land. *Gregg v. Blackmore*, 10 Watts, 192. So, an entry and exclusive possession by an heir, claiming the whole under a title paramount to that of the ancestor, is a disseisin of his co-heirs. *Ricard v. Williams*, 7 Wheat. 60, 121. So, the purchase, by one tenant in common, of his companion's title, at a sheriff's sale, and an exclusive claim under it; *Jackson v. Brink*, 5 Cowen, 483; and an exclusive claim under a partition, which turned out to be void; *Jackson v. Tibbits*, 9 Cowen, 241; have been held sufficient proof of an ouster. So, a conveyance of the whole, by deed, and an entry by the grantee, under his deed. *Bigelow v. Jones*, 10 Pick. 161. [So where one of two joint tenants overflows the lands of the joint estate so as to appropriate them. *Jones v. Weatherbee*, 4 Strobb. 50.] But a conveyance of a distinct portion of the land, by metes and bounds, by one joint tenant or tenant in common, though it be with warranty, cannot operate to the injury of his co-tenant; though it may bind the grantor, by way of estoppel. *Bartlett v. Harlow*, 12 Mass. 348; *Varnum v. Abbot*, *Ibid*, 474. *Porter v. Hill*, 9 Mass. 34; *Baldwin v. Whiting*, 13 Mass. 57; *Rising v. Stannard*, 17 Mass. 285. In *Ohio*, it has been held otherwise. See 4 Kent, Comm. 368, and cases there cited. *Infra*, § 30, note. And see 2 Greenl. on Evid. §. 318. [One tenant in common, by his own deed, whatever it may purport to convey, can have no effect upon the title and interest of his co-tenant. *Bigelow v. Topliff*, 25 Vt. (2 Deane,) 273. One of two tenants in common cannot be ousted by the other, except by a notorious and continued possession, unequivocally hostile. *Peck v. Ward*, 18 Penn. State R. (6 Harris,) 506; *Small v. Clifford*, 38 Maine, (3 Heath,) 213; *Wass v. Buckman*, *Ib*. 356; *Abercrombie v. Baldwin*, 15 Ala. 363. Where two mortgagees are tenants in common, an entry by one under the purchase of the equity of redemption, or under color of a judgment, or otherwise, would not be an ouster of the other, but as between them it enures for the benefit of both. *Root v. Stow*, 13 Met. 10. A mortgage of the whole estate by one tenant in common is not conclusive evidence of an ouster of his co-tenants. *Wilson v. Collishaw*, 13 Penn. State R. (1 Harris,)

16. One tenant in common *received all the rents for twenty-six years*. In an ejectment brought by the other tenant in common, for the recovery of his moiety, the question was, whether this possession of twenty-six years amounted to an expulsion of the companion so as to divest his estate.

It was said that tenants in common, as well as joint tenants and coparceners, have a joint possession, and the possession of one is the possession of both; that the perception of the profits did not amount to an expulsion. One tenant in common might, indeed, disseise another; but then it must be done by an actual disseisin, and not by a bare perception of the profits only.

The Court was of opinion that there was *no adverse possession*, no keeping the plaintiff out of possession. One tenant in common had received the rent, and not accounted for it to the other; but there was no expulsion, no ouster. (a)

17. Notwithstanding the principle established in the preceding case, it has since been determined that thirty-six years *sole and uninterrupted possession* by one tenant in common, without any account or demand made, or claim set up by his companion, was a sufficient ground for a jury to presume an actual ouster of the co-tenant.

18. Upon a rule to show cause why a new trial should not be

(a) *Fairclaim v. Shackleton*, 5 Burr. 2604.

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276. See *Moore v. Collishaw*, 10 Barr, 224. One of two tenants in common cannot by the purchase of an outstanding title, or of an incumbrance, acquire title to the whole as against his co-tenant, but such purchase will operate to the benefit of both, and the purchaser is entitled to claim contribution from his co-tenant. *Jones v. Stanton*, 11 Mis. 433. See also *Gray v. Bates*, 3 Strobb. Eq. 24; *Watkins v. Eaton*, 30 Maine, (17 Shep.) 529.]

In some cases an ouster may be presumed by the jury, from an exclusive and peaceable occupancy for a long period of time. Thus, such presumption has been authorized from an occupancy of *about forty years*; *Jackson v. Whitbeck*, 6 Cowen, 632; *thirty-six years*; *Doe v. Prosser*, Cowp. 217; *more than twenty-one years*; *Mehaffy v. Dobbs*, 9 Watts, 363; *Frederick v. Gray*, 10 S. & R. 182; and *twenty years and upwards*; *Lloyd v. Gordon*, 2 H. & McIl. 254. And see *Chambers v. Pleak*, 6 Dana, 426; *Bolton v. Hamilton*, 2 Watts & Serg. 294; *Watson v. Gregg*, 10 Watts, 289; [*Cross v. Robinson*, 21 Conn. 379; *Black v. Lindsay*, Busbee, Law, (N. C.) 463; *Johnson v. Toulmin*, 18 Ala. 50; *Gill v. Fauntleroy*, 8 B. Mon. 177. So, if a tenant in common renounces the title of his co-tenant, and then holds continued adverse possession for twenty years, he thereby acquires title to the land. *Larman v. Huey*, 13 B. Mon. 436.]

In an early case in New York, an exclusive and quiet possession, for forty-two years, was held to raise a *conclusive presumption of law*, of an ouster. *Van Dyck v. Van Beuren*, 1 Caines, 84. But this is contrary to the current of authorities, the presumption, being now regarded as a mere inference of fact. See *Doe v. Prosser*, and *Jackson v. Whitbeck*, *supra*.



granted, Lord Mansfield reported that from the year 1734, one tenant in common had been in the sole possession of the lands, without any claim or demand by any person or persons claiming under the other tenant in common. That no actual ouster was proved; but, upon the circumstances, he had left it to the jury to say, whether there was not sufficient evidence before them to presume an actual ouster; and supposing there was an actual ouster, in that case the lessors of the plaintiff were barred. The jury found there was sufficient evidence to presume an actual ouster.

After the case had been argued, Lord Mansfield said:—"It is very true that I told the jury they were warranted by the length of time in this case, to presume an adverse possession and ouster by one of the tenants in common of his companion; and I am \*still of the same opinion. Some ambiguity seems \*404 to have arisen from the term *actual ouster*, as if it meant some act accompanied with real force, and as if a turning out by the shoulders were necessary. But that is not so.\* A man may come in by rightful possession; and yet hold over adversely, without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. For instance, length of possession during a particular estate, as a term for 1000 years, or under a lease for lives as long as the lives are in being, gives no title; but if tenant *pour autre vie* hold over for twenty years, after the death of *cestui que vie*, such holding over will in ejectment be a complete bar to the remainder-man or reversioner, because it was adverse to his title. So, in the case of tenants in common, the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion, because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him to be co-tenant. Nor, indeed, is a refusal to pay of itself sufficient, without denying his title; but if, upon demand by the co-tenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse, and ouster enough. The question then is, whether the possession in this case, after the particular estate ended, was a possession as tenant in common *eo nomine*, or adverse.

"It is a possession of near forty years, which is more than

quadruple the time given by the statute for tenants in common to bring their action of account, if they think proper, namely, six years; but in this case no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right; therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession, for such a length of time, is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing."

The other Judges concurred, and the rule for a new trial was discharged. (a)

19. It was determined, in the following modern case, 405\* that \*where one tenant in common *levied a fine of the whole estate*, and took the rents and profits afterwards, without account, for nearly five years, this was *no evidence* whence a jury should be *directed*, against the justice of the case, *to find an ouster* of his companion at the time of the fine levied,

20. Philip Fincher being tenant for life, remainder to his first and other sons in tail, remainder to all his daughters as tenants in common in tail, (who afterwards levied a fine,) died, leaving three daughters; Mary married to Thomas Hornblower, Ann married to Nicholas Pearsall, and Margaret, who died unmarried before her sister Mary. Mrs. Hornblower, under her marriage settlement, having a power to dispose of her share, executed it in favor of the right heirs of her husband, with a power of revocation. She survived her husband, and died in March, 1796. The lessor of the plaintiff claimed as heir at law of her husband, under her appointment. After her death, N. Pearsall and Ann his wife, levied a fine of the whole estate as of Easter term, 1796. It was understood before the trial, that the defendants meant to claim under a deed or will, or both, of Mrs. Hornblower, executed subsequent to the deed of appointment before mentioned; in consequence of which the plaintiff's counsel produced evidence by anticipation, which went decidedly to prove that at the time, and long before, when the supposed instrument bore date, Mrs. Hornblower was insane; whereupon the defendant's counsel, saying they were not then prepared to meet that case, stood

(a) Doe v. Prosser, Cowp. 217. Doe v. Bird, 11 East, 49.

upon their title, derived from the fine, operating upon what they contended was an adverse possession, by Pearsall and his wife, of the whole estate, at the time of the fine levied; as to which it appeared in evidence, that since the death of Mrs. Hornblower, and till Pearsall's death, the latter alone received the whole rent; and that no rent was ever paid to the lessor of the plaintiff, and no entry was proved to be made by him.

\* The jury, under the Judge's direction, found a verdict \* 406 for the plaintiff; and leave was given to the defendant to enter a nonsuit, if the Court should be of opinion that an entry was necessary to avoid the fine.

Lord Kenyon. The whole of the defence is founded in a most unrighteous and fraudulent proceeding; and, in order to give effect to it, the legal operation of the fine is insisted on; and it is asked, if this were not an adverse possession by Pearsall, at the time of the fine levied, where the line was to be drawn. He said he had no hesitation in saying where the line of adverse possession began, and where it ended. *Primâ facie*, the possession of one tenant in common was that of the other, and every case and *dictum* in the books were to that effect. But it might be shown that one of them had been in possession, and had received the rents and profits to his own use, without account to the other; and that the other had acquiesced in this for such a length of time as might induce a jury, under all the circumstances, to presume an actual ouster of his companion, and there the line of presumption ended. In the case of *Doe v. Prosser*,<sup>(a)</sup> Lord Mansfield rightly said, it was not necessary to show actual force, in order to prove an ouster, as by turning a man out by the shoulders; but, as was also observed by Mr. Justice Aston, it might be inferred from circumstances, which circumstances were matter of evidence to be left to a jury. There, there was an undisturbed and exclusive possession by one tenant in common for forty years, which the Court properly held to be sufficient evidence of an ouster, to leave to a jury; but no Judge could think himself warranted in directing a jury to make such a presumption in this case, in order to work the grossest injustice, and in aid of fraud. What was the case here? During Mrs. Hornblower's life, Pearsall held as tenant in common with

(a) *Ante*, § 18.

her; he received all the rent, but he accounted for her proportion. She died in the month of March, 1796, the defendants or \*Pearsall having, as was supposed, procured from her, at a time when the jury had found her to be insane, an instrument conveying the property to them. Then in Easter term following, for the purpose of securing the possession of this ill-gotten property, the fine was levied. But Pearsall had then done no act which manifested that he held the possession of the whole adversely; the levying a fine of the whole was no ouster of his companion. About a month intervened between the death of Mrs. Hornblower and the levying of the fine. What notice was there to the lessor of the plaintiff at that time that Pearsall had acted adversely, so that he should be taken to have acquiesced in his title? All the cases mentioned went upon the ground of acquiescence in an adverse holding, in order to presume an ouster. In *Fairclaim v. Shackleton* (a) there had been a perception of the rent by one tenant in common for twenty-six years; but the title of the other being admitted, no ouster was presumed. Without an ouster was found by the jury, the possession of one tenant in common must be taken to be the possession of all. He admitted that upon the principle of the case of *Lade v. Holford*, (b) the jury might from circumstances presume an ouster; and where the fact was so found, the legal consequences would ensue; but no Judge would advise a jury to make the presumption in this case. Then, unless the holding were adverse, there was no occasion for an entry to avoid the fine. Suppose a tenant for years levied a fine, no entry by the landlord would be necessary in order to enable him to maintain an ejectment at the end of the term. In *Taylor v. Horde*, (c) Lord Mansfield said, that in order to advance justice he would enable the real owner in such a case to consider himself kept out by wrong or not, at his election. So a tenant in common might rely on the possession of his co-tenant, as his own, unless there were an actual ouster in fact, or the jury found it from circumstances; but nothing of that sort was here found; and therefore the Court might consider the levying of the fine as rightfully and legally done, and intended to operate only on that share of the premises to which the defendants were lawfully entitled.

(a) *Ante*, § 16. (*Hart v. Gregg*, 10 Watts, 185. *Hall v. Matthias*, 4 Watts & Serg. 331.)

(b) Tit. 12, c. 2. Tit. 35, c. 13.

(c) 1 Burr. 111.

Mr. Justice Lawrence cited the case of *Coppinger v. Keating*, on a writ of error from Ireland, Mich. 22 Geo. III., where one of two brothers, professing the Catholic religion, entered, on the \*death of his elder brother, on the lands of which \*408 they were tenants in common, in consequence of the gavel act; which enacted that the lands of persons of that persuasion should descend to all the males, according to the custom of gavelkind; and held them for several years until his death; and the Court determined that the son of the elder brother was not barred by the Statute of Limitations; as the uncle was tenant in common with him under that act, no actual ouster being found. The rule for entering a nonsuit was discharged. (a)

21. Estates held in common are *subject to curtesy*; therefore, if a woman, tenant in fee or in tail of a portion of an estate held in common with another, marries, has issue, and dies, her husband will be entitled to her portion of the estate as tenant by the curtesy; and the seisin of one tenant in common will be considered as the seisin of the other, for this purpose.

22. A died, leaving a wife, a son, and a daughter. The widow entered upon the estate, and was seised as tenant in dower of one part, as tenant in common with her son of another part, and of a third as guardian in socage to him. The son went beyond sea, and died there under age, whereby the daughter became entitled to his share. She, during her infancy, married the plaintiff; and together with him applied to the mother to be let into possession of the son's part, which the mother refused, imagining the son was still alive, and therefore insisted to hold the land for him. Upon this they filed a bill in Chancery for an account, which was accordingly directed. After this the daughter died; and upon further application to the Court by the husband, one question was whether the seisin of the mother, after the son's death, being tenant in common with the daughter, was the seisin of the daughter sufficient to make the husband tenant by the curtesy of her part.

The Court held it was sufficient; for the entry and possession of one tenant in common was the entry and possession of the other; accordingly it was decreed for the plaintiff. And it was said that where one entered claiming the whole for himself, in exclusion of his companion, this might not serve as the entry of

(a) *Peaceable v. Read*, 1 East, R. 568. *Doe v. Elliot*, 1 B. & Ald. 85.

his companion, being made directly against him; but that was not this case. For it appeared that the mother's keeping possession of the whole against her daughter and her husband \* band was \* entirely owing to a mistake, in imagining her son was still living, not with an intent to exclude the daughter from her right; therefore no inference could be drawn from it. (a)

23. Estates held in common are also *subject to dower*, so that the widow of a tenant in common will be entitled to one third of her husband's portion.

24. Thus where, in a writ of dower by a widow against the heir of her husband, the tenant pleaded that A was seised, and devised the tenements to the husband, and two more equally to be divided; by which they were tenants in common; and so demands judgment of the writ, supposing that the widow could not sue dower, before partition, against tenants in common. But, upon demurrer, it was adjudged that the writ will lay. (b)

25. In a case of this kind, *dower must be assigned in common*; for the widow cannot have it otherwise than her husband had it. (c)<sup>1</sup>

26. [It is sometimes doubtful whether the *real estate of partners, purchased out of their partnership property*, will be subject to the dower of the partners' wives.<sup>2</sup>

Where it is conveyed to them as tenants in common, and there is no agreement among them which will impress the real estate with the character of personalty, there seems to be no reason why

(a) *Sterling v. Penlington*, 14 Vin. Ab. 511.

(b) *Sutton v. Rolfe*, 3 Lev. 84.

(c) 1 Inst. 34, b. 37, b.

<sup>1</sup> But if partition has been made, either by the husband in his lifetime, or, by process of law before or after his decease, the widow is bound by it, wherever it would have bound the husband, and must take her dower in the part set off as his share. *Potter v. Wheeler*, 13 Mass. 504.

<sup>2</sup> On this point, see *ante*, Vol. I. tit. 6, ch. 2, § 15, 16; where it is shown that the land has, in equity, all the attributes of personal estate, until the debts of the partnership are paid, and its purposes are accomplished; subject to which, the wife is entitled to her dower. See also Collyer on Partnership, by Perkins, § 133, 135, 154—156, with the notes of the learned editor. Whether the wife may compel the surviving partner first to exhaust the personalty, in payment of the partnership debts, *quære*; and see *Thornton v. Dixon*, 3 Bro. C. C. 199, by Belt, and note; *Ripley v. Waterworth*, 7 Ves. 425—452; *Bell v. Phyn*, 9 Ves. 453; *Balmain v. Shore*, 9 Ves. 500; *Stewart v. Bute*, 11 Ves. 666; *Selkrigg v. Davies*, 2 Dow, 242; *Crawshay v. Maule*, 1 Swanst. 495, 508, 521; *Smith v. Smith*, 9 Ves. 189; 1 Mont. Partn. App. 97; 1 Roper, Husb. and Wife, 346, note, 2d ed.

dower should not attach. So, if the whole of the real estate were conveyed to one or more of them in trust for themselves and the other partners, in the absence of any such agreement, the share of the partners to whom the conveyance was made, would, in like manner, be subject to dower. But where there is such an agreement between the partners, as, for instance, that, on dissolution of the partnership, the land shall be sold, it has been held that such agreement converts the land into personalty. †

27. In the absence of any agreement having the above effect, it appears doubtful whether the mere circumstance that the land was bought for the purposes of the partnership, will alone convert it, as between the representatives of a partner. ‡

\* Lord Erskine, in *Stuart v. The Marquis of Bute*, (a) \*410 said that the difficulty of distinguishing and arranging the partnership property of different natures, partly real and partly personal, had never, except by the effect of the contract or the will, been held sufficient against the heir.

But in *Selkrigg v. Davies*, (b) Lord Eldon, C., is reported to have said: "My own individual opinion is, that all property involved in a partnership concern, ought to be considered personal estate;" and in the case of *Townshend v. Devaynes*, 30th June, 1812, he decided against the heir. In *Crawshay v. Maule*, (c) his Lordship appears to consider the subject as doubtful. §

28. It may be deduced from the cases above cited, that the *real estate purchased with the joint effects* of the partnership, will, *as between the partners*, be considered *personal estate*; and it has been inferred that real estate would, with other joint property, be *primarily liable to the payment of the joint partnership debts*, as between the representatives; and that if the heir or widow of a partner be entitled, their right can attach only on the surplus. ||

29. Where real estate was purchased out of the partnership effects, and, by the agreement of the partners, was to be the

(a) 11 Ves. 666.

(b) 2 Dow, 242.

(c) 1 Swan. 508, 521. Montagu on Partn. vol. 1, App. p. 97.

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† [Thornton v. Dixon, 3 Bro. C. C. 199, by Belt, and note; Ripley v. Waterworth, 7 Ves. 425—452.]

‡ [Thornton v. Dixon, *ubi sup.*; Bell v. Phyn, 7 Ves. 453; Balmain v. Shore, 9 Ves. 500.]

§ [Roper's Husband and Wife, 2d ed. 346, and note.]

|| [Ibid.]

separate property of one of them, to whom it was conveyed, he being considered the debtor to the partnership for the purchase-money, the wife was held entitled to dower out of the whole.] (a)

30. A tenancy in common may be *destroyed by a voluntary partition* of the several shares,<sup>1</sup> which might formerly have been done without deed; provided it was executed in severalty by livery of seisin. In consequence of the Statute of Frauds, 29 Cha. II. c. 3, *no legal partition* can now be made between tenants in common *without deed*. But an *agreement in writing* to make partition will have the *same effect, in equity*, as an actual partition at law. (b)

(a) Smith v. Smith, 5 Ves. 189.

(b) 1 Inst. 169, a.

<sup>1</sup> An alienation by one joint tenant or tenant in common, of all his interest in a particular part of the land, by metes and bounds, whether it be by deed or by the levy of an execution against him, is void, as against his co-tenants; though it may operate by way of estoppel against the grantor by deed, or the judgment creditor, or party claiming under the execution. *Bartlett v. Harlow*, 12 Mass. 349; *Staniford v. Fullerton*, 6 Shepl. 229; *Mitchell v. Hazen*, 4 Conn. 509, 510; *Porter v. Hill*, 9 Mass. 34; *Jeffers v. Radcliff*, 10 N. Hamp. 242; *Jewett v. Stockton*, 3 Yerg. 492; *Griswold v. Johnson*, 5 Conn. 363; [*Great Falls Co. v. Worcester*, 15 N. H. 412; *Soutter v. Porter*, 27 Maine, (14 Shep.) 405. But such deed is voidable only by the co-tenants; it is good and effectual against all the world beside. *Dall v. Brown*, 5 Cush. 289.] But in Ohio, it has been held that one tenant in common might lawfully convey his interest in a part of the land specifically described. *White v. Sayre*, 2 Ohio R. 110; *Prentiss's case*, 7 Ohio R. 129. But see *Walk. Introd.* p. 293, 294; 4 Kent, Comm. 368. In Maryland, also, it has been so held; but only by the operation of the Statute of Descents in that State. *Smith v. Reinecker*, 2 H. & J. 421. But see *Carroll v. Norwood*, 1 H. & J. 100.

[In a conveyance by one tenant in common of his estate in the land held in common, a reservation of his interest in the mines in and upon the land granted, is void. *Adam v. Briggs Iron Co.* 7 Cush. 361. A release to a tenant in common from his co-tenants, of their interest in a specific part of the land held in common, confirms a conveyance previously made by him of that part of the land. *Johnson v. Stevens*, 7 Cush. 431. See also *Norris v. Hill*, 1 Mann, (Mich.) 202. Persons owning lands as tenants in common, were incorporated for the purpose of selling the lands held in common, and the charter was accepted. The title to the lands was held to be thereby vested in the corporation, and that the corporation alone, and not any of the original co-tenants, could maintain actions for injuries to the lands, or breaches of agreements with the corporation. *Colquitt v. Howard*, 11 Geo. 556.

Two tenants in common made partition of their land. The one granted to the other "free liberty of carrying away gravel and sea-weed, off the beach belonging to his part of said farm, and also stones below high-water mark, and liberty to tip the sea-weed on the bank of his part of said farm." It was held that this grant created a right of common appurtenant to the land of the grantee, but a right in common with the grantor, and one restricted in its extent; and also that a right of way to and from the shore, passed as an incident to the common granted, and that both the right of way and the right of common would pass in a conveyance of the land under the general name of appurtenances. *Hall v. Lawrence*, 2 R. I. 218. See *Bowen v. Conner*, 6 Cush. 132.]



31. Tenants in common were compellable to sever their estates by writ of partition under the statutes 31 & 32 Hen. VIII., and 8 & 9 Will. III. c. 31, which have been already stated. (a) †

\* 32. In a writ of partition, a rule to show cause was \*411 granted, and afterwards made absolute, on affidavit of service, for the Court to proceed to examine the title of the defendant; process having been duly returned, the declaration entered, and no appearance entered by the tenant within ten days. The Court, on making the rule absolute, appointed to proceed on the examination in open court on the next day. Accordingly, Serj. Walker, for the demandant, opened his title, of which abstracts had previously been left with the Judges; it fortunately proved not to be very intricate. The several seisins, descents, devises, and conveyances, were proved by affidavits. The deeds and wills were produced and read; and no counsel appearing for the tenant, the Earl of Thanet, judgment on his default was given for the demandant, to hold in severalty the premises demanded in his count; in some of which he was seised of two undivided third parts, and in others of a moiety only, in common with Lord Thanet. A writ of partition was awarded. (b)

33. In a subsequent term, the sheriff returned that he had executed the same, in the presence of persons who attended for the plaintiff and defended respectively; and specified in his return the several parcels, with their metes and boundaries: hereupon Walker, for the plaintiff, moved for final judgment, *quod partitio sit stabilis*; the rule for which was made absolute the last day of the term, on affidavit of notice to the defendant and tenants in possession. ‡

34. Partitions of estates held in common are now *usually made by a commission out of Chancery*, in the same manner as partitions of joint tenancies: but in such case it is not necessary that every part of the estate should be divided; for it will be sufficient if each tenant in common have an equal share of the whole. (c)<sup>1</sup>

(a) Tit. 18, c. 2, § 30, 41, and note.

(b) *Halton v. Thanet*, 2 Black. R. 1184—1159.

(c) Tit. 18, c. 2, § 42.

† [But that writ is abolished from the 1st day of June, 1835.]

‡ [It has been lately held, that the statute 8 & 9 Wm. 3, c. 31, applies only to those cases where the tenant does not appear. *Dyer v. Bullock*, 1 Bos. & Pul. 344.]

<sup>1</sup> For the jurisdiction of Partition in Chancery, and the manner of its exercise, see 1 Story on Eq. Jurisp. ch. 14, § 646—658; Allnatt on Partition, ch. 4.

35. A partition was decreed of an estate, which consisted, among other things, of a great house and park. The defendant insisted to have one third of the house, and also a third of the park, assigned to him by the commissioners, who were to make the partition. It was urged for him, that as he was entitled to a third of the whole, so consequently he was to have a third of the house and park; and in many cases in the law, things entire in their nature, as a house, a mill, or an advowson, might be divided. So a tenant in common should have half the house, every other toll dish, and every other turn of the church, &c. That thus it would be at law in case of a writ of partition, and equity followed the law.

Lord Parker said:—Care must be taken that the defendant should have one third part in value of the estate; but there was no color of reason that any part of the estate should be lessened in value, in order that the defendant should have one third of it. Now if the defendant should have one third of the house and park, this would very much lessen the value of both. If there were three houses of different value to be divided among three, it would not be right to divide every house, for that would be to spoil every house. But some recompense was to be made, either by sum of money or rent for owelty of partition, to those who had the houses of less value. It was true, if there were but one house or mill, or advowson, to be divided, then that entire thing must be divided in manner as the other side contended; *secus*, when there were other lands, which might make up the defendant's share. Therefore, since the plaintiff and his wife had two thirds, he recommended that the house and park should be allowed to them; and that a liberal allowance out of the rest of the estate should be made to the defendant in lieu of his share of the house and park. (a)

36. Where an infant is tenant in common with an adult, and a partition of the estate is directed by the Court of Chancery; the conveyance to be made in pursuance of the commission will be respited, till the infant comes of age.

37. Sir George Strode devised divers manors, &c. to trustees and their heirs, in trust for his two granddaughters, Lady Hertford and Lady Brook. On a bill for a partition, Lord King said: "Decree a partition, and for that purpose let a commission issue

(a) *Clarendon v. Hornby*, 1 P. Wms. 446.

to allot one moiety in severalty to the plaintiff, the Lord Brook, and the other moiety in severalty to Lady Hertford, to hold to them according to their respective estates, which they are entitled to under the will; and let the plaintiff and the defendant, the Lady Hertford, be respectively quieted \* in the pos- \* 413 session of the premises severally to be allotted as aforesaid; but forasmuch as the infant plaintiff cannot join in a conveyance of the moiety to the Lady Hertford, so that there cannot be mutual conveyances, let the conveyances to be made by the trustees of the legal estate be respited, until the infant plaintiff comes to twenty-one, or further order of the Court; at which time all parties interested may join in mutual conveyances." (a)

38. On a bill by a tenant in common for a partition against a tenant for life, and an infant tenant in tail in remainder of the other moiety; the usual decree for partition to hold and enjoy in severalty, and for mutual conveyances, was made. But day was given to the infant, till after he came of age, to show cause against the decree. On a motion made by the plaintiff to respite the execution of the conveyance till the infant came of age; the question was, whether the plaintiff was obliged to convey till the infant came of age; because he could not have a conveyance from him till that time.

Sir J. Strange, M. R., was of opinion, that the conveyance by the plaintiff ought to be made immediately, according to the decree; and took a distinction between this case and that of *Brook v. Hertford*. In that case the bill for partition was brought by the infant; in this, it was by an adult, against an infant: but at the importunity of counsel, leave was given to move it again before Lord Hardwicke, who declared his opinion that the conveyance ought to be mutual, not only as to the thing, but also in point of time. He said that the case *Brook v. Hertford*, (b) though different in some circumstances, was a considerable authority; and ordered the conveyance by the plaintiff to be respited. (c) †

(a) *Brook v. Hertford*, 2 P. Wms. 518. See, also, 1 Mad. 214. (b) *Ante*, § 37.

(c) *Tuckfield v. Buller*, Amb. 197. *Baring v. Nash*, 1 Ves. & B. 551.

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† [By the statute 41 Geo. 3, c. 109, § 16, it is enacted, that it shall be lawful for the commissioners in inclosure acts, upon the request in writing of any joint tenants, coparceners, or tenants in common, or any or either of them, or of the husbands, guar-

39. The last manner in which estates in common may be dissolved is, by *uniting all the titles in one tenant*, by purchase or otherwise; which brings the whole to one estate in severalty.†

dians, trustees, committees, or attorneys of such as are under coverture, minors, lunatics, or under any other incapacity, or absent beyond seas, to make partition and division of the estates and allotments, to such of the said owners or proprietors who shall be entitled to the same as joint tenants, coparceners, or tenants in common; and to allot the same accordingly, in severalty.]

† [The statute of 1 Will. 4, c. 65, which relates to property belonging to infants and lunatics beneficially, authorizes (§ 27,) the completion of a contract to make partition entered into by a person subsequently becoming *lunatic*; but it does not seem to authorize guardians on behalf of an *infant* to make partition.]

*Note.*—In the United States, partition may be made *by deed*, as at common law. There are also *five other modes* in which partition may be effected.

The *first*, is where real estate is owned by several proprietors, who are empowered by statutes, under a warrant from a justice of the peace, to organize themselves as a corporation, for the better management of their property, *by votes of the majority*. Partition made by such votes, in due form, and recorded in their book of records, is held binding and conclusive on all the proprietors, without deed or other act. This method is practised chiefly in the division of townships; and is used, substantially in the same manner, in the States of *Maine, Massachusetts, New Hampshire, and Rhode Island*. See *Maine*, Rev. St. 1840, ch. 85; *Mass.* Rev. St. ch. 43; *Adams v. Frothingham*, 3 Mass. 352; *Folger v. Mitchell*, 3 Pick. 396; *N. Hamp.* Rev. St. 1842, ch. 143; *Coburn v. Ellenwood*, 4 N. Hamp. R. 99; *R. Island*, Rev. St. 1844, p. 474.

The *second* method is by the writ *de partitione facienda*, at common law; the proceedings under it being modified, in some of the States, by statutes. This process lies in many of the States, concurrently with other methods of partition, and in some of them it is the only mode resorted to. See *Maine*, Rev. St. 1840, ch. 121; *Massachusetts*, Rev. St. ch. 103; *Rhode Island*, Rev. St. 1844, p. 192—196; *Connecticut*, Rev. St. 1838, p. 392; *LL. New Jersey*, Elm. Dig. p. 385; *Dunlop*, Dig. *LL. Pennsylvania*, ch. 33, § 22, p. 41; *Ziegler v. Grim*, 6 Watts, 106; *Delaware*, Rev. St. 1829, p. 166; *Tate's* Dig. *LL. Virginia*, p. 723; *Maryland*, *Lloyd v. Gordon*, 2 Har. & McHen. 254; *LL. South Carolina*, Vol. VII. p. 294; *Witherspoon v. Dunlap*, 1 McCord, 546; *Indiana*, Rev. St. 1843, ch. 45, art. 4.

The *third* method is by *petition*, preferred in the Courts designated by the statutes which provide this mode of proceeding. And it seems to have been provided to obviate the inconveniences of the writ at common law, on the one hand, and of the bill in chancery, on the other. The proceedings are in general brief, direct, and rather summary in their character; and apply generally to cases where some of the parties are infants, *femes covert*, absent from the State, or unknown, as well as to cases where the parties are present and capable to act. This method prevails in a large majority of the States, and is the one most usually resorted to; but it is not ordinarily deemed exclusive of other lawful modes of partition, unless when made so by statute. It is provided for by the statutes of *Maine*, Rev. St. 1840, ch. 121, and ch. 108; *Massachusetts*, Rev. St. ch. 103; *New Hampshire*, Rev. St. 1842, ch. 206; [*Pickering v. Pickering*, 1 Foster, N. H. 537.] *Vermont*, Rev. St. 1839, ch. 40, 53; *New York*, Rev. St. Vol. II. p. 412, 3d ed.; *Ib.* p. 318; *New Jersey*, Elm. Dig. p. 379, 382; *North Carolina*, Rev. St. ch. 85, Vol. I. p. 450; *Georgia*, Rev. St.

1845, p. 414, § 48; *Michigan*, Rev. St. 1837, p. 482, 487, 488; *Kentucky*, Rev. St. 1834, Vol. II. p. 1066—1071; *Ohio*, Walk. Introd. p. 291, 603, 613; *Tennessee*, Stat. 1787, ch. 17; Stat. 1835, ch. 20, Car. & Nich. Dig. p. 514, 230; *Indiana*, Rev. St. 1843, ch. 45, art. 4; *Illinois*, Rev. Stat. 1839, p. 254, 255, 514, 515; *Missouri*, Rev. St. 1845, ch. 128; *Mississippi*, Rev. St. 1840, ch. 34, § 48, p. 353; *Ibid.* ch. 36, § 13, 14, p. 471; *Alabama*, Rev. St. 1823, by Toulmin, p. 239, 240, 339; *Ibid.* p. 333; *Arkansas*, Rev. St. 1837, ch. 107.

The *fourth* method is by *bill in chancery*, according to the usual course of proceedings in equity. This mode of remedy is supposed to be open in all the States where a general chancery jurisdiction exists; at least in cases not provided for by statutes, or not susceptible of a sufficient and perfect remedy in other tribunals. In some States, the Court of Chancery is named in the statutes, among the other Courts, in which the remedy by petition may be had; but whether this excludes the general jurisdiction of those Courts over matters of partition, is not known to have been decided. See *Delaware*, Rev. St. 1829, p. 168; *North Carolina*, Rev. St. 1837, Vol. I., ch. 85. In *New York*, Rev. St. Vol. II., p. 423, 424, both modes of remedy, by petition and by bill are expressly recognized, as open to parties in Chancery. In *Massachusetts* and *New Hampshire*, where the Supreme Court has only a limited jurisdiction in equity, but it is expressly given in all cases between joint tenants and tenants in common, probably a bill in chancery for partition might, in proper cases, be sustained.

The *fifth* method of partition is in general restricted to the *estates of deceased persons*, in the hands of *heirs* or *devisees*, all claiming under the same title, and whose rights as heirs or devisees, are not in controversy. The cognizance of partition among these is, in many of the States, given to the *Judge of Probate, Surrogate, Orphans' Court*, or other tribunal in which the estate is settled in a course of distribution, as a natural head of the jurisdiction of such Courts. In some instances, the statutes direct that the parties apply *by petition*; in which case the course of proceeding is identical with that by petition in other Courts, in the third method above stated. But as the Courts here described, proceed according to the course of Ecclesiastical Courts in England, in the exercise of their jurisdiction in cases not otherwise provided for, nor accustomed, it is conceived that, where the mode of proceeding in partition is not indicated by statute, nor otherwise regulated, it may in some degree be governed by the rules of the Ecclesiastical Courts, at least so far as concerns the bill or libel and the answer; and therefore it may with propriety be ranked as a distinct mode of partition. This method is used in the States of *Maine, Massachusetts, New Hampshire, Vermont, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, Michigan, Mississippi*, and *Alabama*. See the statutes of those States, cited under the third method *supra*. See also, *Rhode Island*, Rev. St. 1844, p. 240; *Connecticut*, Rev. St. 1838, p. 234; *Pennsylvania*, Dunl. Dig. ch. 375, § 36, p. 472; *Delaware*, Rev. St. 1829, p. 318; *Maryland*, Stat. 1820, ch. 191; LL. *South Carolina*, Vol. VI., p. 248; Vol. VII., p. 246.

Generally speaking, no process for partition lies by the common law, except for a party who is in possession of the freehold. It does not lie for a disseisee; nor for a remainder-man or reversioner during a previous life-estate. 1 Inst. 167, *u*. But in *Maine*, it is expressly given to persons having only a right of entry; and perhaps the same may be inferred from the statutes of *North Carolina* and *Tennessee*, which give the process to every person "*claiming*" an estate in common. In *Missouri*, also, it is given to every person interested, whether in possession or expectancy. [This process does not lie where the petitioner is seized of one moiety in his own right, and together with the respondents as joint trustees with himself of the other moiety, in trust for a third party. *Winthrop v. Minot*, 9 Cush. 405. It lies for one having a present right of entry. *Barnard v. Pope*, 14 Mass. 434; *Marshall v. Crehore*, 13 Met. 462; *Wood v. LeBaron*, 8 Cush. 471; *Tabler v. Wiseman*, 2 Ohio, N. S. 207. But not for a tenant in

common of a reversion in land expectant on a lease for years. *Hunnewell v. Taylor*, 6 Cush. 472. A tenant by the curtesy initiate may have a bill for partition. *Riker v. Darke*, 4 Edw. ch. 668.]

The statute of 31 Hen. VIII. ch. 1, which gave the writ of partition to joint tenants and tenants in common, gave it only to those who were seised of estates of inheritance. The statute of 32 Hen. VIII. ch. 32, extended it still further, to tenants for life or years, holding with others having estates of inheritance. To what extent this latter statute has been adopted in the United States, is not certainly known; but in the absence of any evidence to the contrary, it may be presumed to have been adopted here, as part of our common law.

The language of the statutes of most of the States, providing the process in partition, is broad enough to include tenants for years, as well as others, among the persons entitled to compulsory partition; but in *Georgia*, as the statute speaks only of persons "*seised*," it would seem to be restricted to tenants of the freehold. In *Massachusetts*, this remedy is given to tenants for a term of years, whereof twenty years at least remain unexpired, against those holding a greater estate; and to all other tenants for years, *inter sese*. And see *Wells v. Prince*, 9 Mass. 508.

Though a partition by parol is void, as to the title, yet a right to a several occupancy may be created by parol, so far, at least, as to give the party, or his lessee, a right of action against his co-tenant, for disturbing his several possession. *Keay v. Goodwin*, 16 Mass. 1; *Clowes v. Hawley*, 12 Johns. 484; *Jackson v. Harder*, 4 Johns. 202; *Jackson v. Vosburg*, 9 Johns. 270; *Jackson v. Livingston*, 7 Wend. 141.

[No parol partition can avail unless it be sanctioned by a possession, sufficient to give title under the Statute of Limitations, or by such lapse of time as justifies a presumption, *omnia esse rite acta*. *Jones v. Reeves*, 6 Rich. 132. A parol partition executed by a corresponding possession is valid, though some of the tenants elect to hold their shares by community of possession. *McMahan v. McMahan*, 13 Penn. State R. (1 Harris,) 376. And so, though one of the tenants be a *feme covert*, and another a minor. *Darlington's Appropriation*, Ib. 430.

In *Massachusetts*, the statute of 1850, ch. 278, provides that the respondent in a petition for partition, shall be entitled to compensation for the value of any improvements, put by him or by those under whom he claims, upon the land, to which the title was believed to be good. In *Indiana*, the defendants in proceedings for partition may, before the partition is awarded, bring to the notice of the Court, any advancements made by the ancestor to any of the heirs, and such advancements, when the amount thereof has been ascertained, will be taken into account by the Court in specifying the shares to be assigned in the petition. Rev. Stat. 1843, p. 841, *Kepler v. Kepler*, 2 Carter, 363. In *New York*, a tenant in common, who makes advances and payments beyond his proportion towards the erection of buildings upon the property held in common, will not thereby acquire an equitable lien upon the property unless there is an express agreement to that effect, or there are some special circumstances giving to such party peculiar equities. *Taylor v. Baldwin*, 10 Barb. Sup. Ct. 582, 626. *Green v. Putnam*, 1 Ib. 500. Thus, where large sums had been expended by the tenants in good faith for valuable improvements, under the belief that they were the sole owners, they were allowed therefor on partition. *Conklin v. Conklin*, 3 Sandf. Ch. 64.]













